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v.
Lori Rabin Williams

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September 1, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Panitz,Philip Garrett

8-9-94 ext til 9-16-94, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Aug 5 1994	G	Application (A94-91) to extend the time to file a petition for a writ of certiorari from August 17, 1994 to September 16, 1994, submitted to Justice O'Connor.
2	Aug 9 1994		Application (A94-91) granted by Justice O'Connor extending the time to file until September 16, 1994.
3	Sep 1 1994	G	Petition for writ of certiorari filed.
4	Oct 6 1994		Brief of respondent Lori Rabin Williams in opposition filed.
5	Oct 12 1994		DISTRIBUTED. October 28, 1994 (Page 14)
6	Oct 19 1994	X	Reply brief of petitioner filed.
7	Oct 31 1994		Petition GRANTED.
			**********
8	Dec 8 1994		Joint appendix filed.
9	Dec 8 1994		Brief of petitioner United States filed.
10	Dec 21 1994		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 22. 1995.(2ND CASE)
11	Dec 23 1994		CIRCULATED.
12	Jan 4 1995		Record filed.
		*	Original record proceedings United States District Court for the Central District of California.
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		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
14	Jan 11 1995	X	Brief of respondent Lori Rabin Williams filed.
15	Jan 30 1995	X	Reply brief of petitioner filed.
16	Feb 10 1995		Letter from the Solicitor General received and distributed.
17	Feb 22 1995		ARGUED.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a tax refund suit may be brought under 28 U.S.C. 1346(a)(1) to obtain a refund of amounts paid by respondent to the Internal Revenue Service to obtain the release of a federal tax lien on her property when the lien arose out of the tax liabilities of a third person.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-6a) is reported at 24 F.3d 1143. The opinion of the district court (App., *infra,* 7a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1994. On August 9, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1346(a) provides, in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any expressed or implied contract with the United States * * *.

2. 28 U.S.C. 2410(a) provides, in relevant part:

> * * * [T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to * * *
>
> * * * * *
>
> real or personal property on which the United States has or claims a mortgage or other lien.

3. 26 U.S.C. 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if

> no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

4. 26 U.S.C. 7422 provides, in relevant part:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (b) Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

5. 26 U.S.C. 6325(b)(3) provides:

> Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge [of federal tax lien] of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the Secretary, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.

6. 26 U.S.C. 7426 provides, in relevant part:

> (a)(1) If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that

such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

* * * * *

(b)(4) If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

STATEMENT

This case concerns a payment made to the United States by respondent Lori Williams to remove a federal tax lien from property held in her name. The lien arose from taxes owed by her husband, Jerrold Rabin, who owned the property with respondent as joint tenant at the time the taxes were first assessed.

1. In April 1975, before respondent and Rabin were married, they purchased real estate in Pacific Palisades, California, as joint tenants. More than a decade later, in June 1987 and March 1988, federal employment tax assessments totalling $14,907 were made against Rabin. Gov't C.A. Br. 3. Those federal tax assessments arose from Rabin's status as general partner of a partnership known as Marco Polo 1. App., *infra,* 2a. Although Rabin and respondent were married at that time, the taxes were owed by Rabin separately and not by respondent (*id.* at 8a-9a).

A federal tax lien securing all taxes, interest and penalties owed by Rabin arose "at the time the assessment [was] made" (26 U.S.C. 6322). This lien reached "all

property and rights to property, whether real or personal, belonging to" him at that time. 26 U.S.C. 6321. Pursuant to 26 U.S.C. 6323(a), however, this lien in Rabin's property was not valid "as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice [of the lien was] filed by the Secretary." *Ibid.*

After the assessments were made, and before notice of the resulting federal tax lien was filed in the local property records, Rabin transferred his joint interest in the real estate to respondent. On October 25, 1988, he recorded a quitclaim deed to the property naming respondent as the title holder. App., *infra,* 8a. Record title therefore vested exclusively in respondent as of that date.

Sixteen days later, on November 10, 1988, the Internal Revenue Service recorded notice of the federal tax lien arising from Rabin's employment tax obligation. App., *infra,* 8a. At various times between November 28, 1988, and March 27, 1989, the IRS made additional assessments for unpaid employment tax liabilities against Rabin in amounts totalling $26,487. Notices of federal tax lien with regard to those additional amounts were filed on June 22, 1989, and July 24, 1989. See CR 10 at 3 (Exhs. B, C, D).

On January 19, 1989, respondent commenced proceedings to dissolve her marriage with Rabin. The decree of divorce was granted on March 19, 1990. App., *infra,* 7a n.1.

2. On May 9, 1989, while the divorce petition was pending, respondent entered into an agreement to sell the property. On June 26, 1989, the IRS filed notice of an additional federal tax lien in the name of "LORI RABIN aka LORI WILLIAMS" as nominee, alter ego and holder of a beneficial interest in the property for Rabin. App., *infra,* 8a. Respondent asserts that, after receiving notice of this

lien, she authorized disbursement of funds from the closing proceeds to pay the tax lien in order to permit the sale to close and to avoid a lawsuit by the purchasers of the property. *Ibid.*

On July 3, 1989, the tax claims of the United States, along with the claims of a number of other creditors, were paid through the sale escrow. Rabin's outstanding federal tax liability of $41,369 was paid in this manner. App., *infra,* 2a, 8a. At the time of this disbursement, respondent's marriage to Rabin had not been dissolved.

3. Respondent thereafter filed an administrative claim for refund of the amount paid to the United States at her direction. Her refund claim was denied. On September 30, 1991, respondent commenced this action in federal district court seeking a refund of the $41,369 paid to the United States, plus interest, costs, and attorney's fees, under 28 U.S.C. 1346(a)(1). That statute provides jurisdiction in the federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The district court granted summary judgment to the United States. App., *infra,* 7a-18a. The court concluded that a federal tax refund suit may not be brought under 28 U.S.C. 1346(a)(1) by any party other than the taxpayer who is liable for the taxes at issue. The court noted that "[t]he Supreme Court has twice in recent months reaffirmed a restrictive approach to waiver of sovereign immunity" and that "a majority of the Circuits which have addressed [the issue before the court] have held that a

narrow construction of section 1346(a)(1) is appropriate and limits standing to sue under the statute to the taxpayer against whom the tax was assessed" (App., *infra,* 9a-10a, 11a). The court rejected, as erroneous, the contrary holding of the Fourth Circuit in *Martin* v. *United States,* 895 F.2d 992 (1990), that a person who pays taxes owed by a third party may bring a refund action under 28 U.S.C. 1346(a)(1). App., *infra,* 16a-17a.

4. The Ninth Circuit reversed. App., *infra,* 1a-6a. Following the Fourth Circuit's holding in *Martin* v. *United States, supra,* the court of appeals held that 28 U.S.C. 1346(a)(1) "clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes" (App., *infra,* 4a, quoting 895 F.2d at 994). In so ruling, the court of appeals expressly disagreed with the contrary holdings of the Fifth and Seventh Circuits in *Snodgrass* v. *United States,* 834 F.2d 537 (5th Cir. 1987), and *Busse* v. *United States,* 542 F.2d 421 (7th Cir. 1976). The court of appeals stated that the latter opinions "fail to give sufficient attention to the plain language of section 1346(a)(1)" (App., *infra,* 6a). The court of appeals further explained that its decision to follow *Martin* was supported by earlier decisions of the Ninth Circuit which, though decided under different statutory provisions, had allowed third parties to sue for refunds of taxes they had paid but did not owe. App., *infra,* 5a, citing *United States* v. *Halton Tractor Co.,* 258 F.2d 612 (9th Cir. 1958), and *Parsons* v. *Anglim,* 143 F.2d 534 (9th Cir. 1944).

REASONS FOR GRANTING THE PETITION

A conflict exists among the courts of appeals on the common, recurring question presented in this case. The court of appeals held in this case that a person who pays taxes owed by another may bring a tax refund suit under

28 U.S.C. 1346(a)(1). In so ruling, the court of appeals adopted the reasoning and conclusion of the Fourth Circuit in *Martin* v. *United States,* 895 F.2d at 994. In contrast with the decision in this case, the Seventh Circuit has recently reaffirmed its position that "only persons legally liable for paying a given federal tax may bring a refund suit" under 28 U.S.C. 1346(a)(1). *Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp.* v. *United States,* 22 F.3d 741, 743 (1994). Several other circuits have agreed with the Seventh Circuit that 28 U.S.C. 1346(a)(1) does not create jurisdiction for tax refund suits brought by persons who have paid taxes owed by a third party. *E.g., Snodgrass* v. *United States,* 834 F.2d 537, 539 (5th Cir. 1987); *Eighth Street Baptist Church, Inc.* v. *United States,* 431 F.2d 1193, 1194 (10th Cir. 1970); *Phillips* v. *United States,* 346 F.2d 999, 1000 (2d Cir. 1965); *First Nat'l Bank* v. *United States,* 265 F.2d 297, 299-300 (3d Cir. 1959). See also *Lac Courte Oreilles Chippewa Indians* v. *United States Internal Revenue Serv.,* 845 F.2d 139, 142 (7th Cir. 1988); *Hofheinz* v. *United States,* 511 F.2d 661, 662 (5th Cir. 1975).

Absent resolution of the clear conflict among the circuits on this recurring question, the treatment of claims for refunds by third parties will continue to vary solely due to geographical happenstance. For the reasons we will describe, the analysis adopted by the court of appeals in this case misinterprets the interlocking provisions Congress has enacted to provide remedies for non-taxpayers and, in doing so, threatens to provide a mechanism for the delay or evasion of tax collection.

1. Respondent seeks a refund of taxes she paid that were owed by her husband. Her tax refund claim does not fall within the jurisdiction afforded by 28 U.S.C. 1346(a)(1). That provision establishes jurisdiction in the federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The jurisdiction described by that provision, however, is expressly limited by 26 U.S.C. 7422(a), which provides, in *haec verba,* that (*ibid.*; emphasis added):

> *[n]o suit or proceeding shall be maintained in any court* for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.*

In turn, 26 U.S.C. 6511(a) provides that such a claim for refund or credit must be filed, within specified time limits, "by the taxpayer" (*ibid.*). The term "taxpayer" is defined in the Internal Revenue Code to mean "any person subject to any internal revenue tax." 26 U.S.C. 7701(a)(14).

Reading these provisions as a whole, only a "taxpayer" (under 26 U.S.C. 7701(a)(14)) who has filed a timely claim for refund (under 26 U.S.C. 6511(a)) is authorized to maintain a suit for refund in any court (26 U.S.C. 7422(a)) for the erroneous collection of the tax or for any other sum wrongfully collected under the internal revenue laws (28 U.S.C. 1346(a)(1)).[1] The Second, Third, Fifth, Seventh

[1] In the course of a lengthy, historical review of the antecedents of the tax refund procedures existing at the time of the decision on

and Tenth Circuits have thus correctly concluded that the jurisdiction described in 28 U.S.C. 1346(a)(1) exists only for suits brought by a "taxpayer." See page 8, *supra*. See also *Luce* v. *United States*, 444 F. Supp. 347, 348 & n.1 (W.D. Mo. 1977); *Bailey* v. *United States*, 104 F. Supp. 997, 1000-1001 (Ct. Cl. 1952); *Naus* v. *Brodrick*, 103 F. Supp. 233, 234-237 (D. Kan. 1951).

By contrast, the Ninth Circuit in this case (App., *infra*, 4a-6a) and the Fourth Circuit in *Martin* v. *United States*, 895 F.2d at 994, incorrectly viewed 28 U.S.C. 1346(a)(1) in isolation. In particular, these courts failed to consider the express limitations established in 26 U.S.C. 7422(a) on the jurisdiction provided by 28 U.S.C. 1346(a)(1). By failing to consider the plain language of *all* of the applicable statutes, the Fourth and Ninth Circuits reached an incorrect understanding of the statutory scheme.[2]

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rehearing in *Flora* v. *United States*, 362 U.S. 145 (1960), the Court noted that 26 U.S.C. 7422(a), by its terms, creates no jurisdiction and is thus not itself "a jurisdictional statute at all" (362 U.S. at 152). By limiting the circumstances in which a suit of the type specified under 28 U.S.C. 1346(a)(1) may "be maintained in any court" (26 U.S.C. 7422(a)), however, the statute limits the scope of the jurisdiction afforded under the other provision. The language of the two statutes, which is in *haec verba*, must be read together to determine which suits may be maintained within the jurisdiction of the federal district courts.

[2] Of the nine conflicting circuit court decisions (see page 8, *supra*), only the Fifth Circuit (*Snodgrass* v. *United States*, 834 F.2d at 539) cited this Court's decision in *Stahmann* v. *Vidal*, 305 U.S. 61 (1938). In *Stahmann*, the Court held that a cotton producer who paid a federal "cotton ginning" tax could bring a refund action for the allegedly unconstitutional tax. Although the ginning tax was imposed directly on cotton ginners, the Court concluded that the producers could bring refund suits in their own names because the tax "was intended to fall, and the [Bankhead Cotton] Act attempted to make it fall, upon the producers." *Id.* at 65. Concluding that the tax was, in substance, imposed on the producers, the Court noted that the unique

2. Congress has provided non-taxpayers with remedies other than a tax refund suit. In particular, a person (such as respondent) who believes that a tax lien arising from

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"scheme of the [Bankhead Cotton] Act sets the case apart from any to which our attention has been called arising under other taxing acts." *Ibid.*

Having resolved the case on this basis, the Court added, in dicta, that "[w]hether or not the tax was imposed upon the [producers], they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods [to remove the ginning tax lien]." 305 U.S. at 66. The "accepted principles" described in *Stahmann* apparently related to a common law restriction on tax refund suits. Prior to 1924, a taxpayer could not bring a refund suit to recover taxes for which he was personally liable *unless* the taxes had been paid under protest or duress. See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 375-377 (1933). In 1924, however, Congress added what is now 26 U.S.C. 7422(b) to the Internal Revenue Code, expressly to permit a taxpayer to bring a refund suit "whether or not such tax, penalty, or sum has been paid under protest or duress" (*ibid.*). See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. at 375-377. The only appellate decisions cited by the Court in *Stahmann* (305 U.S. at 64 n.6) related to a different point: they drew a distinction between (i) plaintiffs who paid assessments which they believed (correctly or not) had been made against them, who were permitted to bring a refund suit as the "taxpayer," and (ii) plaintiffs who "knowingly" (and in this sense "voluntarily") paid taxes *owed by a third party*, who were *not* allowed to bring a refund suit. See *ibid.*, citing, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d 408, 411 (6th Cir. 1934) (the statute "gives no aid to one who 'pays another's tax actually due, with full knowledge of what he is doing' "), cert. denied, 294 U.S. 712 (1935); *Clift & Goodrich, Inc.* v. *United States*, 56 F.2d 751, 753 (2d Cir. 1932); *Wourdack* v. *Becker*, 55 F.2d 840, 842 (8th Cir.), cert. denied, 286 U.S. 548 (1932).

Since 1938, this Court has cited its decision in *Stahmann* v. *Vidal* only once. In *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940), the Court cited *Stahmann* for the proposition that "[t]he taxpayer is the person ultimately liable for the tax itself." *Id.* at 52. See also 26 U.S.C. 7701(a)(14) (defining the term "taxpayer" to mean "any person subject to any internal revenue tax"). In the present case, it is undisputed that it is Rabin, not respondent, who "is the person ultimately liable for the tax itself" (*Colorado Nat'l Bank* v. *Bedford*, 310 U.S. at 52).

the obligations of someone else has improperly been imposed on her property may commence an action to "quiet title" to that property under 28 U.S.C. 2410(a)(1). The validity of the federal tax lien could be adjudicated in that action. If that remedy would be inadequate to permit a desired, prompt sale of the property, a person in respondent's position would be able to obtain an immediate certificate of discharge of the federal tax lien by agreeing with the Secretary to hold the proceeds of such a sale "as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property" (26 U.S.C. 6325(b)(3)). The respective rights of the non-taxpayer and the United States in such a fund (in particular, the validity of the federal tax lien in the property) are then to be determined in a suit brought in federal district court under 26 U.S.C. 7426(b)(4).[3]

These express remedies for non-taxpayers under Title 26 would be made largely superfluous under the interpretation of 28 U.S.C. 1346(a)(1) adopted in this case. In enacting 26 U.S.C. 7426 in 1966, however, Congress had a quite different view. The legislative history reflects that, prior to that statute's enactment, the courts had generally held that the United States could not "be sued by third persons where its collection activities interfere with their property rights." S. Rep. No. 1708, 89th Cong., 2d Sess. 29-31 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 27-29 (1966). As the Fifth Circuit noted in *Snodgrass* v. *United States*, 834 F.2d at 539, in concluding that 28 U.S.C.

[3] Similarly, the Internal Revenue Code provides a comprehensive set of remedies for any non-taxpayer who asserts that the United States has wrongfully levied on his property to collect taxes. These remedies are set forth in 26 U.S.C. 7426, which is entitled "Civil Actions By Persons Other Than Taxpayers." No such levy occurred in this case.

1346(a)(1) does not afford jurisdiction for refund suits by non-taxpayers, "[t]he legislative history of [26 U.S.C. 7426] indicates Congress's intent that it, rather than an expansively-interpreted § 1346(a)(1), serve as the remedy for third parties harmed by tax levies." See also *Busse* v. *United States*, 542 F.2d at 425.

3. The analysis adopted by the court of appeals threatens to provide a haven for delay or evasion of tax liabilities. Indeed, the facts of this case present a model that other taxpayers could employ for this purpose.

a. When a taxpayer's obligation has been paid by a third party, the Treasury would have no basis for pursuing further collection efforts. Since no outstanding tax obligation would remain, there would be no basis for collecting any further tax. Moreover, any outstanding lien on the taxpayer's property would be discharged. See 26 U.S.C. 6325(a)(1) (providing for the release of liens when the tax liability "has been fully satisfied").

b. If a non-taxpayer who had paid the taxpayer's obligation were thereafter permitted to bring a suit for a refund under 28 U.S.C. 1346(a)(1), within the period permitted by the statute of limitations,[4] and were to prevail on the theory that the lien on her property had been invalidly imposed, it could then be too late for the United States to pursue further collection actions against the taxpayer. See 26 U.S.C. 6502(a)(1) (Supp. IV 1992) (suit for collection to be brought within ten years of the assessment). Even if the statute of limitations for collection had not expired, the fact that liens on the taxpayer's property

[4] 26 U.S.C. 6532(a), entitled "Suits by Taxpayers For Refund," generally provides a two-year statute of limitations for refund suits from the date that notice of disallowance of the refund claim is mailed by the Secretary. By contrast, 26 U.S.C. 6532(c) generally requires a non-taxpayer to commence suit for wrongful levy under 26 U.S.C. 7422 within nine months of the date the levy occurred.

were discharged when the taxes were previously paid (by the non-taxpayer) would obviously hinder further tax collection efforts.

c. Under the analysis adopted by the court of appeals in this case, a taxpayer may thus seek to delay or evade final collection of his tax obligations by the artifice of having the taxes paid by another person, who would then assert a claim that the payment made by her was erroneous. No doubt recognizing the risks and complications that would result from "tax refund" actions by non-taxpayers, Congress has provided wholly separate remedies for taxpayers and non-taxpayers. The decision in this case erroneously focussed on only one of the applicable statutory provisions and thereby misunderstood the elaborate, interlocking scheme that Congress has enacted.

4. The question presented in this case is one of substantial recurring importance. In the absence of a decision from this Court, the treatment of claims for refunds by third parties will vary solely because of the circuit in which the taxpayer happens to reside. Review by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56207
D.C. No. CV-91-5286-WMB

LORI RABIN WILLIAMS, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge Presiding

Argued and Submitted
March 10, 1994—Pasadena, California

Filed May 19, 1994

Before: HARRY PREGERSON, DIARMUID F. O'SCANNLAIN,
and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge O'SCANNLAIN

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether one who erroneously pays the taxes of another may sue for a refund.

I

In April 1975, Jerrold Rabin ("Rabin") and his then wife Lori Rabin (now Lori Williams) ("Williams") purchased a house in Pacific Palisades, California. On June 29, 1987, and March 28, 1988, the government assessed employment tax liabilities against Rabin. On October 20, 1988, Rabin transferred all of his interest in the house to Williams as her separate property. On October 25, 1988, Rabin recorded a quitclaim deed giving title to "Lori Williams an unmarried woman."[1] On November 10, 1988, the Internal Revenue Service ("IRS") filed the first in a series of tax liens against the property in order to satisfy outstanding employment taxes owed by Rabin and Marco Polo 1, a partnership in which Rabin was a general partner. On January 19, 1989, Williams filed a petition for dissolution of her marriage to Rabin.

On approximately May 9, 1989, Williams entered into an escrow agreement to sell the house. On June 26, 1989, the IRS recorded another lien. Under protest, Williams authorized disbursement of $41,369 to the IRS so that she could convey clear title. On March 19, 1990, Williams' marriage to Rabin was dissolved.

After her administrative claim for refund was denied, Williams filed suit in federal district court under 28 U.S.C. § 1346(a)(1) for a refund of the money owed by Rabin which she had paid to the IRS, plus interest, costs, and attorneys' fees. The parties filed cross-motions for summary

[1] The couple was still married at the time.

judgment. The government argued lack of jurisdiction because 28 U.S.C. § 1346(a)(1) does not allow suits by third-party plaintiffs. On September 2, 1992, the district court denied Williams' motion for summary judgment and granted the government's motion for summary judgment. The district court held that a third party who is not liable for a tax, but who pays it in order to remove a lien against property, may not sue for a refund under 28 U.S.C. § 1346(a)(1). Williams timely appealed.

II

Jurisdiction is the only issue before this court. The government argues that section 1346(a)(1) limits standing to the "taxpayer," defined as the person against whom the taxes were assessed. Title 28 U.S.C. § 1346(a) reads:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws. . . .

Williams contends that section 1346(a)(1) specifically grants jurisdiction for taxes that are "erroneously collected" which is precisely what happened to her. In response, the government argues "that the Government's consent to be sued must be construed strictly in favor of the sovereign." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (internal quotations omitted).

Although the government is correct that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed,' " *id.* at 1014, we believe

that the language of section 1346(a)(1) clearly permits such suit. The Fourth Circuit addressed this same issue in *Martin* v. *United States,* 895 F.2d 992 (4th Cir. 1990). In *Martin,* the IRS filed a lien against property which then belonged, after a divorce, to the former wife ("Martin"), to satisfy the tax liabilities of the former husband. Martin paid the tax in order to remove the lien so that she could sell the property with clear title. She then sued for a refund under 28 U.S.C. § 1346(a)(1). The district court dismissed the suit for lack of jurisdiction, but the Fourth Circuit reversed. The Fourth Circuit relied on "a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax 'alleged to have been erroneously or illegally *assessed* or *collected.*' " *Martin,* 895 F.2d at 994. The court concluded that "[t]he statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appellant[ ] because [she] did not owe them." *Id.*

We find the reasoning of the Fourth Circuit persuasive and adopt *Martin* as the law of this circuit. The facts in the case before us are similar. As in *Martin,* "there is no question in this case but that the taxes paid by the appellant[ ] were erroneously collected," *id.*; in open court, the government conceded its 1989 lien was not valid against Williams' property.[2]

---

[2] Our decision is consistent with the Supreme Court's requirement of an "unequivocal expression" to sustain a waiver of sovereign immunity. *United States v. Nordic Village, Inc.,* 112 S. Ct. 1011, 1014 (1992). That case concerned an ambiguous waiver of sovereign immunity under § 106 of the Bankruptcy Code, whereas the plain language of § 1346(a)(1) unambiguously covers *all* cases of erroneous tax assessment and collection.

Our decision to follow *Martin* is consistent with prior precedent. In *Parsons v. Anglim,* 143 F.2d 534, 536 (9th Cir. 1944), we held that a widow who erroneously paid her husband's income taxes after his death had standing to bring suit for a refund because she had been told that if she did not pay her husband's taxes immediately, she would have to pay penalties to the government. Similarly, in *United States v. Halton Tractor Co.,* 258 F.2d 612 (9th Cir. 1958), this court granted standing to a third party who erroneously paid the taxes of a delinquent taxpayer. In *Halton Tractor,* two corporations, Halton and Durston, sold equipment to a contractor, Watson, and executed conditional sales contracts to secure payment. Because Watson owed approximately $10,000 in taxes to the government, the IRS put notices on the machinery stating "Property of the United States Government (Notice of Seizure)." These notices were incorrect because Halton and Durston had superior claims. After paying Watson's taxes to remove the lien, Halton and Durston sued for a refund. We held that Halton and Durston did have standing, following *Parsons,* because the payments were not intended to benefit Watson or the government.

The government argues that subsequent legislation makes it doubtful whether *Parsons* and *Halton Tractor* are still applicable because in 1966, Congress adopted section 7426 of the Internal Revenue Code, which explicitly authorized third-party suits against the government in the case of wrongful government levies. Two other circuits have so reasoned. In *Busse v. United States,* 542 F.2d 421 (7th Cir. 1976), the Seventh Circuit held that a third party who erroneously pays the taxes of another person could not bring a suit for refund under section 1346(a)(1). The court reasoned that *Halton Tractor* must be viewed in light of the fact that the Code at the time did not provide a remedy for nontaxpayers harmed by a wrongful govern-

ment levy but that the addition of section 7426 addressed this problem and, therefore, section 1346 need not be contorted for equity's sake. *Id.* at 425. In *Snodgrass v. United States,* 834 F.2d 537 (5th Cir. 1987), the Fifth Circuit followed the Seventh Circuit and held that section 1346(a)(1) does not allow suit by a party other than the taxpayer against whom the taxes were assessed. *Id.* at 538.

We are unpersuaded by the Fifth and Seventh Circuits' attempts to distinguish *Parsons* and *Halton Tractor.* Rather, we follow the better-reasoned analysis in *Martin* and reject *Busse* and *Snodgrass,* which fail to give sufficient attention to the plain language of section 1346(a)(1).

Since Williams has standing to sue under section 1346(a)(1), the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 91-5286 WMB

LORI (RABIN) WILLIAMS, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Sept. 2, 1992;
Entered Sept. 3, 1992]

ORDER

I. Background.

Plaintiff Lori Williams brings this action under 28 U.S.C. § 1346(a)(1) seeking a refund of $41,369.58, plus interest, costs, and reasonable attorney's fees, from the United States. These funds were paid to the Internal Revenue Service (the "IRS") through escrow on the sale of plaintiff's home as a result of collection actions taken by the IRS against Williams' ex-husband,[1] Jerrold Rabin, and Marco Pollo I, a partnership in which Rabin was formerly a partner.[2]

---

[1] Plaintiff filed a petition for dissolution of the marriage on January 19, 1989. A judgment dissolving the marriage was entered on March 19, 1990.

[2] Marco Pollo 1 and its partners were assessed with employment taxes in the amount of $41,369.58 between June of 1987 and December of 1988.

Plaintiff and Jerrold Rabin purchased the real estate in question in April 1987. On October 20, 1988, they executed an agreement transferring all of Jerrold Rabin's interest in the property to plaintiff as her separate property. On October 25, 1988, Jerrold Rabin recorded a quitclaim deed, naming plaintiff as title holder. On November 10, 1988, after Rabin had given up his interest in the property, the IRS recorded the first in a series of tax liens on the property against Marco Pollo I and Rabin.

On May 9, 1989, plaintiff entered into an escrow agreement to sell the property. On June 26, 1989, seven days before the closing of escrow, the IRS recorded a nominee lien on the property in the name of "Lori Rabin aka Lori Williams". Plaintiff received notice of this lien and asserts that she consequently authorized disbursement of funds to the IRS under protest to permit escrow to close and to avoid a lawsuit by the buyers. On July 3, 1989, a number of creditors, including the IRS, were paid through escrow.

Plaintiff seeks a refund based on the following assertions: (1) she is not the taxpayer; (2) she was not assessed and given notice and demand as to the subject tax liabilities; (3) the liens were against Marco Pollo I, a partnership and its partners, not against her; (4) the subject property had been transferred to her for adequate consideration prior to the filing of the subject tax liens, and therefore the liens could not attach to the subject property; (5) she was not a nominee, with regard to the subject property, on behalf of Marco Pollo I or its partners; and (6) the underlying tax liability, as assessed against Jerrold Rabin for claims arising from taxable periods after December 31, 1987 (the date Rabin registered with the State Board of Equalization a notification that he was no longer a partner in Marco Pollo I) is invalid. The United States concedes "that plaintiff was not assessed with the subject tax liabilities; that she was not responsible for the partnership's . . .

tax liabilities; and, that she is not the taxpayer." Defendant's Motion For Summary Judgment, p. 12 lines 18-21.

The parties have filed cross motions for summary judgment. The United States argues that as a waiver of sovereign immunity, 28 U.S.C. § 1346(a)(1) must be narrowly construed so as to permit a refund suit only by the assessed taxpayer. The United States thus seeks dismissal of the action for lack of subject matter jurisdiction. Plaintiff argues that persons (hereinafter "non-taxpayers") other than the assessed taxpayer may pursue an action for refund under the plain language of section 1346(a)(1). Counsel have agreed that this matter comes before the Court in the posture of a trial on stipulated facts and that adjudication of the issue of plaintiff's standing to bring this suit is dispositive of the action.

II. Discussion.

28 U.S.C. § 1346(a)(1) acts as a waiver of the United States Government's sovereign immunity in affording district courts jurisdiction over refund suits. Section 1346(a)(1) states that district courts shall have original jurisdiction of:

> [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. . . .

The question before the Court is whether this waiver extends to suits brought by non-taxpayers.

The Supreme Court has twice in recent months reaffirmed a restrictive approach to waiver of sovereign im-

munity. In *United States Department of Energy v. Ohio,* 112 S.Ct. 1627 (1992), the Court recited the standard:

> [w]e start with a common rule, with which we presume congressional familiarity (citation omitted) that any waiver of the National Government's sovereign immunity must be unequivocal. (Citation omitted.) "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon v. United States,* 342 U.S. 25, 27, 72 S.Ct., 17, 19, 96 L.Ed. 26 (1951), and not 'enlarge[d] . . . beyond what the language requires.' *Eastern Transportation Co. v. United States,* 272 U.S. 675, 686 (1927)."

112 S.Ct. at 1633, quoting *Ruckelshaus v. Sierra Club,* 103 S.Ct. 3274, 3278 (1983). The Court went on to hold that Congress had not waived sovereign immunity from liability for civil fines imposed by a State for past violations of the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251, *et seq.,* or the Resource Conservation and Recovery Act of 1976, 90 Stat. 2795, 2796, as amended 42 U.S.C. § 6901 *et seq.*

In *United States v. Nordic Village, Inc.,* 112 S.Ct. 1011 (1992), the Supreme Court considered the question of whether 11 U.S.C. § 106(c) waives sovereign immunity from an action seeking monetary recovery in bankruptcy. Rejecting an effort to ground such waiver in the legislative history of the statute, the Court stated:

> the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report. (Citation omitted.)

112 S.Ct. at 1016. After considering several alternative readings of the text of section 106(c), the Court concluded that certain readings inconsistent with waiver "are assured-

ly not the only readings of subsection (c), but they are plausible ones – which is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." 112 S.Ct. at 1016.

Under the approach of *Nordic Village,* for plaintiff to prevail requires the Court to find that the language of section 1346(a)(1) unequivocally waives sovereign immunity with respect to suits by non-taxpayers and that no plausible reading of section 1346(a)(1) would preclude such suits.

While the Ninth Circuit has yet to speak specifically to the issue before the Court, a majority of the Circuits which have addressed it have held that a narrow construction of section 1346(a)(1) is appropriate and limits standing to sue under the statute to the taxpayer against whom the tax was assessed.[3] *See Snodgrass v. U.S.,* 834 F.2d 537, 540 (5th Cir. 1987); *Busse v. United States,* 542 F.2d 421, 425 (7th Cir. 1976); *Phillips v. United States,* 346 F.2d 999, 1000 (2d Cir. 1965); *Eighth Street Baptist Church, Inc. v. United States,* 431 F.2d 1193, 1194 (10th Cir. 1970). Defendant urges the Court to follow these decisions.

Plaintiff, on the other hand, directs the Court to the Fourth Circuit's decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990), which relied on a "plain reading" of section 1346(a)(1) to afford standing to non-

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[3] The harshness of this rule has been mitigated to some extent by the 1966 enactment of 26 U.S.C. § 7426 (entitled "Civil actions by persons other than taxpayers"). Section 7426 provides for an action by any person other than the assessed taxpayer to recover for property wrongfully levied upon. Because section 7426 comes into play only where there has been a levy, however, the majority interpretation of section 1346(a)(1) leaves non-taxpayers with no direct remedy against the IRS for tax payments made voluntarily to remove a lien.

taxpayers. Plaintiff also refers the Court to two Ninth Circuit decisions interpreting the statute which preceded section 1346(a)(1).

A. The Ninth Circuit Authority.

The Ninth Circuit afforded non-taxpayers standing to sue for refunds of erroneously collected taxes in two decisions applying the predecessor to section 1346. The former provisions, 26 U.S.C.A. Int. Rev. Code § 3772(a)(1) and (b), "authorize[d] the recovery of 'any sum * * * in any manner wrongfully collected' 'whether or not such * * * sum has been paid under protest or duress.' " *Parsons v. Anglim,* 143 F.2d 534, 535 (9th Cir. 1944). In *Parsons,* the plaintiff sought a refund of taxes she had paid under protest in anticipation that the collector would wrongfully claim the taxes were due from her as a transferee, and under the assumption that the purported liability would be minimized by prompt payment. The district court held that the plaintiff could not recover her voluntary payment of taxes which were due to the United States from another taxpayer. The Ninth Circuit reversed.

In *United States v. Halton Tractor Company,* 258 F.2d 612 (9th Cir. 1958), two corporations sought refunds for payment of social security and withholding taxes owed by an individual. The corporations had paid these taxes after the collector, claiming the tax lien to be superior to the corporations' security interests, threatened to sell certain equipment securing the individual's obligations to the corporations. The *Halton Tractor* court looked to *Parsons,* characterizing its holding as follows:

> [i]t is clear that the holding in that case was that since the wife did not owe the taxes, and since they could not be collected from her or her property, the Collector in receiving her checks "wrongfully collected the taxes"; that the absence of coercion or duress on the part of the Collector, or the fact that payment was made on plaintiff's own volition, was wholly immaterial so long as it could not be said that the payment was made as a donation for the benefit of the original tax debtor.

258 F.2d at 617. The court then relied on *Parsons* and "the plain language of Sec. 3772(b)"[4] to rule that the voluntary nature of the corporations' payment of the individual's tax liability did not preclude their recovery of a refund. 258 F.2d at 617.[5]

These more than thirty year old decisions plainly did not address the question of waiver of sovereign immunity in the restrictive manner required by *Nordic Village, supra.*

---

[4] The specific language of § 3772(b) cited in *Halton Tractor* was as follows: "[s]uch suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress." *See Halton Tractor,* 258 F.2d at 616.

[5] In *David v. United States,* 551 F.Supp. 850 (C.D. Cal. 1982), the court attempted to reconcile *Parsons* and *Halton Tractor* with the majority position that persons paying the taxes of third parties to release tax liens on their property may not sue for refunds. The courts in the other circuits, according to *David,* had denied the plaintiffs standing "primarily because 26 U.S.C. § 7426 provided plaintiffs an opportunity to seek injunctive relief to prevent the IRS from a wrongful levy on their property in order to satisfy tax obligations of other parties." 551 F.Supp. at 853. In *David,* the plaintiff had paid money to the IRS on the incorrect assumption that he was personally liable for certain corporate tax obligations. The *David* court interpreted *Parsons* to stand for the proposition that "a person who pays a tax of a third party on the assumption that he was personally liable on that tax does have standing to bring a refund action for wrongfully collected taxes." *David,* 551 F.Supp. at 854, citing *Parsons,* 143 F.2d at 536-537. Of course, plaintiff in the instant action made no such assumption. Finally, *David* also cited *Halton Tractor* as lending support by analogy to the conclusion that the plaintiff had standing to pursue a refund action under section 1346(a)(1).

Indeed, neither decision distinguishes its approach to determination of such waivers from that generally taken to statutory interpretation. Moreover, both cases construe a statute—former section 3772 of title 26—other than the one presently at issue. *Halton Tractor* relies on former section 3772(b)'s language disavowing the relevance of protest or duress to infer that the Government "would not insist upon retaining moneys which it had received when it had no right to collect them." 258 F.2d at 617. Such language was not included in section 1346(a)(1), and even if it had been, this kind of inference would not comport with *Nordic Village*'s requirement of an unequivocal waiver in the statutory text. For these reasons, the Court declines to give *Halton Tractor* and *Parsons* significant weight.

B. The Majority Position.

Discussed below are two appellate decisions which fairly represent the majority position concerning the issue before the Court.

In *Busse, supra,* the Seventh Circuit directly addressed the question of "whether one who is not liable for a tax but pays it to remove a lien against his property may sue for a refund under 28 U.S.C. § 1346(a)(1)." 542 F.2d at 423. The court suggested that *Halton Tractor* "must be viewed in light of the failure of the Code prior to 1966 to provide a remedy for a third party whose property or interest in property was harmed by a wrongful government levy." *Id.* at 425. The court further observed that "[t]he Senate Report on 26 U.S.C. § 7426, which remedied this deficiency, noted that some courts tried to cure the inequitable situation by allowing suits in such cases against IRS' district directors." *Id.*, citing Sen. Rep. No. 1708, 89th

Cong., 2d Sess., 1966 *U.S. Code Cong. & Adm. News* at 3750.[6]

Noting the weight of authority for the proposition that a refund suit cannot be brought by a person who owns or has an interest in property that has been levied upon to satisfy the tax obligations of a third party, the *Busse* court concluded that there was no meaningful distinction where a person pays the tax of another to eliminate the threat of seizure and avoid a levy. The court also noted the obligation to construe waivers of sovereign immunity narrowly, 542 F.2d at 425, citing *Phillips, supra,* 346 F.2d at 1000. Finally, the court suggested the following alternative means to contest a tax lien: suit to quiet title under 28 U.S.C. § 2410; an action challenging a wrongful levy under 26 U.S.C. § 7426; and negotiation with the IRS to transfer the lien from the property to the proceeds of sale in order to clear title for conveyance. *Id.*

Snodgrass, supra, involved a wife seeking a refund of taxes paid by her husband out of community property and, she alleged, erroneously collected from her. The Fifth Circuit held that section 1346(a)(1) "does not allow suit by a party other than the taxpayer against whom the taxes were assessed, at least when the IRS has not coerced the payment by the third party." 824 F.2d at 538. Following *Busse,* the court rejected the plaintiff's assertion of coercion, noting that "the Snodgrasses themselves decided to sell their house; the IRS never demanded that they do so; and the IRS required payment of the proceeds only as a condition of releasing the tax liens so that the Snodgrasses'

[6] Under *Nordic Village,* it is clear that a determination of waiver of sovereign immunity may not rely on material outside the text of the statute at issue. 112 S.Ct. at 1016. *Nordic Village* does not address the propriety of considering such material in reaching a determination that no waiver has occurred.

buyer could receive clear title." *Id.* at 539-540. Acknowledging the inequity which might result from its ruling, the court quoted the Second Circuit's observation in *Phillips, supra,* that "the spirit property to judicial consideration of a waiver of sovereign immunity is not one of generosity and broad interpretation." *Id.*, quoting *Phillips,* 346 F.2d at 1000.

At the very least, the majority interpretation of section 1346(a)(1) reflected in these decisions establishes a plausible alternative to plaintiff's interpretation of the statute.

C. The Fourth Circuit Position.

The Fourth Circuit rejected the majority position concerning the jurisdiction reach of section 1346(a)(1) in *Martin* v. *U.S.,* 895 F.2d 992 (4th Cir. 1990). In that decision, which also involved the payment of another's tax liability in order to deliver clear title to the buyers of property, the court stated:

> [a]lthough appellants argue for a broad reading of the statute and the IRS argues for a narrow interpretation, we think the result of this case requires neither, but lies instead in a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax "alleged to have been erroneously or illegally *assessed* or *collected*. . . ." Although the statute is silent as to who can bring the action, implicit in its language is that one against whom the tax was erroneously assessed *or* collected has standing to do so.
>
> In the case at hand, after appellants paid the taxes, the IRS conceded that it did not have a valid lien on the property because [the taxpayer] did not have a sufficient ownership interest in it. Thus, there is no question in this case but that the taxes paid by the appellants were erroneously collected.
>
> The statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appelants because they did not owe them.

895 F.2d at 994 (emphasis original). Plaintiff relies heavily on *Martin,* asking the Court to apply it's reasoning directly to this case. Defendant suggests that after acknowledging tht waivers of sovereign immunity require strict construction, the *Martin* court erroneously abandoned that standard of interpretation for a less restrictive "plain reading" standard.

D. Analysis.

The *Martin* court did not have the benefit of the Supreme Court's subsequent decision in *Nordic Village.* In the wake of *Nordic Village*'s insistence on an unequivocal expression of waiver in the statutory text, 112 S.Ct. at 1016, *Martin*'s reasoning from an assertion which is "implicit in [the statute's] language" must be deemed infirm.

Furthermore, the interpretation of section 1346(a)(1) adopted by the majority of appellate courts which have addressed this issue—concluding that the waiver of sovereign immunity does not extend to refund suits by non-taxpayers—may not be characterized as implausible. Under *Nordic Village,* the existence of a plausible alternative reading denying plaintiff standing to bring a refund suit is fatal to plaintiff's position. *See id.* Section 1346(a)(1)'s silence with respect to whom may bring a refund suit creates an ambiguity which must be resolved in favor of the sovereign. *See, e.g., United States Department of Energy, supra,* 112 S.Ct. at 1643; *McMahon v.*

United States, 72 S.Ct. 17, 19 (1951). The Court therefore agrees with defendant's contention that the standard of statutory interpretation adopted by the *Martin* court is not sufficiently restrictive.

The Court further agrees with defendant that application of the appropriate standard compels a determination that section 1346(a)(1) does not waive the United States' Government's sovereign immunity from refund suits brought by persons other than the assessed taxpayer. Because plaintiff was not assessed with the taxes that she paid, her action under section 1346(a)(1) must be dismissed for lack of subject matter jurisdiction.

III. Conclusion.

Plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

DATED: Sept. 2, 1992

/s/ Wm. Matthew Byrne, Jr.

WM. MATTHEW BYRNE, JR.
United States District Judge

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No. 94-395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

LORI RABIN WILLIAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lori Rabin Williams ("Williams") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision by the United States Court of Appeals for the Ninth Circuit in this case. All relevant statutes are attached to this brief in Appendix "A".

SYNOPSIS OF CASE

The case as presented by the government in their petition is quite simple. Whether a tax refund suit may be brought by one who voluntarily pays the tax owing by another. As discussed below, however, the taxes in this case were not paid voluntarily and were not owing by the third person. The government is attempting to squeeze a round peg into a square hole to enable them to argue broader principles than the facts of this case warrant.

This case was decided at the District Court level by mutual submissions of motions for summary judgment. The total amount in controversy in this case is slightly over $40,000. All facts were stipulated. The Internal Revenue Service admitted both in their pleadings and in oral argument at both the District and Appeals level that the collection of taxes from Williams was erroneous.

The Ninth Circuit Court of Appeals agreed that the collection was erroneous and that both Title 28 U.S.C. 1346(a) and Title 26 U.S.C. 7422(a)[1] ("Section 1346(a)" and "Section 7422" respectively) provide a waiver of sovereign immunity to Williams when it has been proven (and in this case admitted by the government) that an erroneous collection has occurred. The Ninth Circuit Court of Appeals decision was based on a reading of the plain language of those statutes, and is attached to this brief as Appendix "B".

[1] All citations to code sections are to the Internal Revenue Code unless otherwise noted. The Internal Revenue Code is Title 26 of the United States Code. Section 1346(a)(1), the jurisdictional statute that is the centerpiece of the controversy in this case, is not in the Internal Revenue Code but resides in Title 28 of the United States Code.

This case is not the appropriate case to resolve the issues concerning Section 1346(a). As discussed in more detail later, Williams was the ex-wife of Jerrold Rabin ("Rabin"). Unlike the situation where an unrelated third party voluntarily pays the taxes of another and then sues for a refund, this case presents more convoluted side issues. These side issues include: (i) the definition of a "taxpayer" when an ex-spouse is concerned, (ii) an erroneous IRS lien being filed while a residential dwelling was in escrow, and (iii) the decision to pay the lien to allow escrow to close to avoid imminent foreclosure and a threatened lawsuit by the buyers, requiring consideration of the additional side issue of "duress."

In addition, this case was argued at both the District Court and Court of Appeals levels on the issue of whether or not the plain language of Sections 1346(a) and 7422 provided jurisdiction to a "non-taxpayer" to sue for a refund. The government argues that there is a wide split between the Circuit Courts of Appeal on this issue. Yet, in their petition for Certiorari to this Court, the government argues for the first time that the prerequisite administrative claim for refund required pursuant to Title 26 U.S.C. 6511(a) ("Section 6511") was not met because Williams was not the "taxpayer", and for that reason is not provided a forum to allow her to file a claim and sue for the refund.

There is no split of authority in the Circuit Courts of Appeal on that issue. In fact, recent Federal Court decisions have dismissed the government's argument as specious (see Section (C) of this brief in opposition). There is no dispute that compliance with Section 6511 (the so-called "administrative claim" statute) is a prerequisite to filing an action in District Court for a refund.

All the Circuits that have rendered opinions on section 6511 agree that this statute is a prerequisite to jurisdiction. Since this case was submitted as mutual summary judgment motions with the sole issue being jurisdiction under Sections 1346(a) and 7422, it hardly seems appropriate to grant certiorari to decide the "issue" of Section 6511. In a summary judgment motion, all facts alleged by the party against whom the motion is brought are assumed true.

In fact, the government never argued to the District Court that Section 6511 was not complied with. Williams filed an administrative claim pursuant to Section 6511 and it was denied, at which time she timely filed her action in District Court. Williams alleged in the jurisdictional section of her complaint that she had complied with the prerequisites of Section 6511, and the government did not dispute it. Therefore, it was effectively stipulated below that Williams had complied with filing her administrative claim. The government has reinvented this case at the Supreme Court level focusing their argument on Section 6511, but in so doing cannot continue to argue that this is a case that is appropriate for Supreme Court review, since there currently exists no split among the Circuit Courts regarding this new issue.

Lastly, the facts in this case are so egregious against the government they should weigh heavily against granting the petition. In essence, the government has admitted that they took $41,000 from a person who they admit did not owe the money, that such collection was in fact erroneous, and now refuse to give it back to her under the cloak of sovereign immunity and the ruse of non-compliance with procedural rules that were never argued below.

COUNTERSTATEMENT OF THE CASE

The government in their petition for certiorari make numerous factual representations which were never proven and are actually erroneous.

A. Rabin did not owe the entire tax liability collected from Williams

In their question presented, the government paraphrases the issue as a claim for refund by Williams to the Internal Revenue Service "to obtain the release of a federal tax lien on her property when the lien arose out of the tax liabilities of a third person." The third person they refer to is William's ex-husband Jerrold Rabin ("Rabin").

It is not a fact that Rabin owed the taxes in question.

The underlying tax liability in this case arose from the non-payment of payroll taxes by a partnership that was operating a restaurant called "Marco Pollo I." Rabin was a former partner in the Marco Pollo I partnership; however, he withdrew from the partnership prior to most of the payroll tax liabilities accruing. The government stipulated at the District Court level to the actions Rabin took in withdrawing from the partnership which enabled him to withdraw legally under California partnership law.

Therefore, the question presented is not as clear cut in this case as the government makes it appear. We are not in a situation where a party voluntarily pays the taxes of a third party, but rather under duress pays the taxes that *were not correctly determined to be owed* by the third party.

The government on several occasions makes these factual representations regarding Rabin owing the taxes in

question, but these bald assertions are without foundation. On page 4 of the government's petition, they state "the lien arose from taxes owed by her husband, Jerrold Rabin . . .", "the taxes were owed by Rabin separately", "a federal tax lien securing all taxes, interest and penalties owed by Rabin arose . . ." and continuing on page 5, "arising from Rabin's employment tax obligation." Later, the government again asserts as a fact that the underlying tax obligation was owed by her ex-husband Rabin, on page 8 they cite to a line of cases regarding the payment of a valid obligation by a third party volunteer, "several other circuits have agreed . . . . 1346(a)(1) does not create jurisdiction for tax refund suits brought by persons who have paid taxes *owed* by a third party," and on the same page "Respondent seeks a refund of taxes she paid that were *owed* by her husband". In this last statement, the government no longer considers Rabin the ex-husband of Williams, merely asserting that Rabin is Williams' husband. In all the statements above, the government leads this Court to believe that Rabin as a fact owed the payroll taxes.

In the government's motion for summary judgment in this matter filed with the United States District Court, on page 8, they acknowledge that "on December 31, 1987, Jerrold Rabin registered with the State Board of Equalization a notification that he was no longer a partner with Marco Pollo I, partnership [sic]. See copy of State Board of Equalization correspondence, dated February 4, 1992, and copy of Declaration of Publication attached as exhibits S & T, respectively." The government's motion and the exhibits were made a part of the excerpts of record filed with Court of Appeals as document no. 10. The California State Board of Equalization acknowledged that Rabin had effectively withdrawn from

the partnership as of December 31, 1987. The letter from the California State Board of Equalization is attached to this brief in opposition as Appendix "C".

The alleged tax liability that the government states as a fact was owing by Rabin accrued by quarters commencing with the 4th quarter of 1986 through the last quarter of 1988, the government exhibits indicated that the 2nd quarter of 1987 was not owing, presumably because it was paid although this was never established. Rabin was not a partner during the last four quarters of 1988 as indicated above. Most of the payroll tax liability accrued during the four quarters of 1988. Rabin's purported tax liability, therefore, was significantly less than half of what the government collected from Williams.

The resolution of the issue of standing when a "non-taxpayer" voluntarily pays the taxes owed by another are not presented in the fact pattern of this particular case, since it also can be argued that Rabin was not the "taxpayer" for the bulk of the payroll tax obligation. Therefore, this case is a bad candidate for Supreme Court Review on the issue presented by the government.

B. Williams did not pay the taxes voluntarily

The government in their petition asserts that other methods were available to Williams when confronted by an erroneous lien on her property by the IRS, other than authorizing escrow to close by paying the lien. They imply that this authorization makes the payment to the IRS out of escrow a "voluntary" payment. This assertion may be analogized to an armed robbery, and the thief who is holding the innocent victims at gun point later asserts that he should not be held accountable for his action or be ordered to return the valuables stolen,

since the victims paid voluntarily and had other alternatives to forking over the money. The thief argues that such alternatives included refusing to turn over the cash or suing the thief later for conversion.

The government created the situation. Without thorough investigation and with reckless disregard for property rights or due process, the IRS filed a lien against a residential property in the middle of an escrow. They now admit that the filing of the lien was in error, and that Williams did not owe the money to the IRS. However, they refuse to return the money by asserting that Williams had the right to file a lawsuit against them to "quiet title" pursuant to Title 28 U.S.C. 2410(a)(1). Ignoring for a moment the tremendous additional costs such an action would entail, it is also a fact omitted from the petition that the government never informed Williams of any of her rights or alternatives upon their filing the lien. Williams was under extreme duress at the time of escrow. Williams had found a buyer for her property while in foreclosure proceedings. The government's assertion that this case fits into the simple fact pattern of a person *voluntarily paying the taxes owed by another* is simply not true.

C. Cases refuting the government's new argument related to Section 6511

Two recent Federal decisions have discussed the government's new argument in this case, that the jurisdictional statute Section 1346(a)(1) must be read in conjunction with Section 6511 and Title 26 U.S.C. 7701(a)(14), and the government's novel interpretation of these two statutes they argue deny Williams standing in this case.

In *Brodey v. United States,* 788 F. Supp. 44 (D. Mass. 1991), the court specifically discussed the word "taxpayer" as a term of art. The court concluded that first, Section 1346(a)(1) conferred standing on the person against whom the tax has been erroneously collected. In determining this threshold issue, the court looked to the plain language of the statute and the decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir., 1990).

Next, the court acknowledged that the jurisdictional statute, Section 1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit with certain conditions, pursuant to the United States Supreme Court decision in *Dalm v. United States,* 494 U.S. 596 (1990).

In considering the relevant tax code statutes, the court concluded that Section 6511 is silent on the issue of standing. "On its face, it is a statute of limitations. It uses the word 'taxpayer' in a natural, grammatically correct way from which I cannot find any inference of a limitation on standing". *Brodey* at pg. 48.

The court also concluded Section 7422 is silent on the issue of standing. "On its face it imposes a requirement for administrative exhaustion prior to lawsuit. The government does not assert its procedures were not followed. The word 'taxpayer' does not appear in the text of this section". *Brodey* at pg. 48.

"Section 7701(a)(14) is a definitional statute. The definition of 'taxpayer' appears to be inclusive of anyone at all who is subject to any internal revenue tax at all. The government has advanced no reasoning from which the court could transform this inclusive definition into an exclusive one. I cannot find any support for the

government's narrow reading of the term 'taxpayer' from the statutory definition in Section 7701(a)(14) or elsewhere in the Code". *Brodey* at pg. 48.

Earlier this year, in *Barris v. United States,* 851 F. Supp. 696 (W.D. Pa. 1994) cited both *Mona Martin* and *Brodey* with approval. "The rule that only those taxpayers who were actually assessed taxes by the IRS can bring suit for a recovery ignores important language in Section 1346(a)(1). It seems clear that in this case, plaintiff has alleged that an Internal Revenue tax has been erroneously or illegally collected from her. Thus, Section 1346(a)(1) confers jurisdiction on this court to hear this case.

"Section 6511(a) requires that a claim for refund 'shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid.' This section merely imposes a time limitation on the person filing the claim for a refund or an overpayment of tax. Ths use of the word 'taxpayer' in this statute of limitations does not constitute a limitation on standing."

The government's attempt to now argue the question of standing regarding Section 6511 makes this case inappropriate for Supreme Court review. The decision of the Ninth Circuit Court of Appeals did not address this issue, since the government never brought the issue to the attention of the Court nor argued this position in their briefs[2].

[2]The government did mention Section 6511 for the first time in a footnote to their brief to the Ninth Circuit Court of Appeals. In footnote 18 of that brief, the government mentions that an administrative claim under Section 6511(a) is a prerequisite to jurisdiction and quotes the statute, underlining and emphasizing the [footnote continued]

D. The government's argument that the Court of Appeals decision below provides a "haven for delay or evasion of tax liabilities" is a thinly veiled smoke screen

In their petition for certiorari, the government makes a statement that the decision of the Court of Appeals in this case "threatens to provide a haven for delay or evasion of tax liabilities." In the pure factual situation, where a third party voluntarily pays the taxes owed by another, and then wants his or her money back after the statute of limitations for collection against the original party who owed the taxes has expired, the government has a valid point. This case, however, does not present those facts.

In this case, we have an innocent party who under duress allowed funds to be paid to the IRS through an escrow for the disputed tax liability of her ex-husband. The IRS negligently recorded the lien, and ultimately admitted their error. The position adopted by the government in this case would effectively reward the IRS for their incompetence. The IRS would be permitted to operate using a standard far below due diligence in determining who is liable for taxes, and then when the incorrect party who was the victim of the IRS lien requests their money back all the IRS needs to do is admit their mistake but refuse to allow a refund relying on the doctrine of sovereign immunity.

word "taxpayer". Then in the same footnote, the government cites to Section 7701(a)(12) incorrectly for the definition of "taxpayer" (the actual statute is Section 7701(a)(14)). The government advances no argument, however, as to what these statutes mean in the context of the Williams case or that somehow they deny Williams standing to file a claim for refund. The government relied solely on their interpretation of Section 1346(a)(1) for that purpose.

The government has the audacity in this case to present an argument that allowing an innocent party to receive their money back for taxes they paid under duress and did not owe would effectively provide a haven for evasion, when the IRS had totally within their control and power the ability to determine who was the correct party to pay the taxes in the first place. If the government exercises a modicum of caution, due diligence and restraint, they would not be put in the position of having a statute of limitations run against them while they, like Don Quixote, chase windmills.

CONCLUSION

For all the preceding reasons, this case does not present a fact pattern that warrants review by the United States Supreme Court. We therefore respectfully request that the government's petition for certiorari be denied.

Respectfully submitted,

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GREGORY ROSS GOSE
(Counsel of Record)
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Attorneys for Respondent.

October 1994

APPENDIX A

RELEVANT STATUTES

Title 28 U.S.C. 1346(a)(1)

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Title 26 U.S.C. 7422(a)

(a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Title 26 U.S.C. 6511(a)

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever

of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

Title 26 U.S.C. 7701(a)(14)

The term "taxpayer" means any person subject to any internal revenue tax.

APPENDIX B

NINTH CIRCUIT DECISION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56207

D.C. No. CV-91-5286-WMB

LORI RABIN WILLIAMS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
March 10, 1994 – Pasadena, California

Filed May 19, 1994

Before: Harry Pregerson, Diarmuid F. O'Scannlain,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Tax/Litigation and Procedure

The court of appeals reversed a district court judgment and remanded. The court held that a third party who is not liable for tax, but who pays it in order to remove a lien against property, may sue for a refund.

While they were still married, Jerrold Rabin and appellant Lori Williams purchased a house. The government assessed tax liabilities against Rabin. Rabin transferred his interest in the house to Williams as her separate property, then quit-claimed title to her. The government filed a lien against the property. Williams filed to dissolve the marriage and entered into an escrow agreement to sell the house. The governmnet filed another lien. Under protest, Williams paid money to the government so that escrow could close. The marriage was dissolved.

Williams filed an administrative claim for refund, then filed suit in district court for refund plus interest and costs. The government moved for summary judgment, arguing lack of jurisdiction on the ground that suits by third-party plaintiffs are not permissible under 28 U.S.C. §1346(a)(1). The court granted the government's motion.

[1] The language of §1346(a)(1) clearly permits such suit. Another circuit has found that the statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund. [2] That reasoning is persuasive. [3] Other circuits' attempts to distinguish precedent in accord from this circuit are not persuasive. Those attempts failed to give sufficient attention to the plain language of §1346(a)(1).

COUNSEL

Philip Garrett Panitz, Staker and Gose, Camarillo, California, for the plaintiff-appellant.

Kevin M. Brown, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

O'SCANNLIAN, Circuit Judge:

We must decide whether one who erroneously pays the taxes of another may sue for a refund.

I.

In April, 1975, Jerrold Rabin ("Rabin") and his then wife Lori Rabin (now Lori Williams) ("Williams") purchased a house in Pacific Palisades, California. On June 29, 1987, and March 28, 1988, the government assessed employment tax liabilities against Rabin. On October 20, 1988, Rabin transferred all of his interest in the house to Williams as her separate property. On October 25, 1988, Rabin recorded a quitclaim deed giving title to "Lori Williams an unmarried woman."[1] On November 10, 1988, the Internal Revenue Service ("IRS") filed the first in a series of tax liens against the property in order to satisfy outstanding employment taxes owed by Rabin and March Polo 1, a partnership in which Rabin was a general partner. On January 19, 1989, Williams filed a petition for dissolution of her marriage to Rabin.

On approximately May 9, 1987, Williams entered into an escrow agreement to sell the house. On June 26, 1989, the IRS recorded another lien. Under protest, Williams authorized disbursement of $41,369 to the IRS

[1] The couple was still married at the time.

so that he could convey clear title. On March 19, 1990, Williams' marriage to Rabin was dissolved.

After her administrative claim for refund was denied, Williams filed suit in federal district court under 28 U.S.C. §1346(a)(1) for a refund of the money owed by Rabin which she had paid to the IRS, plus interest, costs, and attorneys' fees. The parties filed cross-motions for summary judgment. The government argued lack of jurisdiction because 28 U.S.C. §1346(a)(1) does not allow suits by third-party plaintiffs. On September 2, 1992, the district court denied Williams' motion for summary judgment and granted the government's motion for summary judgment. The district court held that a third party who is not liable for a tax, but who pays it in order to remove a lien against property, may not sue for a refund under 28 U.S.C. §1346(a)(1). Williams timely appealed.

II

Jurisdiction is the only issue before this court. The government argues that section 1346(a)(1) limits standing to the "taxpayer," defined as the person against whom the taxes were assessed. Title 28 U.S.C. §1346(a) reads:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been exdessive or in any manner wrongfully collected under the internal-revenue laws. . . .

Williams contends that section 1346(a)(1) specifically grants jurisdiction for taxes that are "erroneously collected" which is precisely what happened to her. In

response, the government argues "that the Government's consent to be sued must be construed strictly in favor of the sovereign." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992) (internal quotations omitted).

[1] Although the government is correct that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocably expressed,' " *id.* at 1014, we believe that the language of section 1346(a)(1) clearly permits such suit. The Fourth Circuit addressed this same issue in *Martin v. United States,* 895 F.2d 992 (4th Cir. 1990). In *Martin,* the IRS filed a lien against property which then belonged, after a divorce, to the former wife ("Martin"), to satisfy the tax liabilities of the former husband. Martin paid the tax in order to remove the lien so that she could sell the property with clear title. She then sued for a refund under 28 U.S.C. §1346(a)(1). The district court dismissed the suit for lack of jurisdiction, but the Fourth Circit reversed. The Fourth Circuit relied on "a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax 'alleged to have been erroneously or illegally *assessed* or *collected.*' " *Martin,* 895 F.2d at 994. The court concluded that "[t]he statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appellant[ ] because [she] did not owe them." *Id.*

[2] We find the reasoning of the Fourth Circuit persuasive and adopt *Martin* as the law of this circuit. The facts in the case before us are similar. As in *Martin,* "there is no question in this case but that the taxes paid by the appellant[ ] were erroneously collected." *id.*; in

open court, the government conceded its 1989 lien was not valid against Williams' property.[2]

Our decision to follow *Martin* is consistent with prior precedent. In *Parsons v. Anglim,* 143 F.2d 534, 536 (9th Cir. 1944), we held that a widow who erroneously paid her husband's income taxes after his death had standing to bring suit for a refund because she had been told that if she did not pay her husband's taxes immediately, she would have to pay penalties to the government. Similarly, in *United States v. Halton Tractor Co.,* 258 F.2d 612 (9th Cir. 1958), this court granted standing to a third party who erroneously paid the taxes of a delinquent taxpayer. In *Halton Tractor,* two corporations, Halton and Durston, sold equipment to a contractor, Watson, and executed conditional sales contracts to secure payment. Because Watson owed approximately $10,000 in taxes to the government, the IRS put notices on the machinery stating "Property of the United States Government (Notice of Seizure)." These notices were incorrect because Halton and Durston had superior claims. After paying Watson's taxes to remove the lien, Halton and Durston did have standing, following *Parsons,* because the payments were not intended to benefit Watson or the government.

The government argues that subsequent legislation makes it doubtful whether *Parsons* and *Halton Tractor* are still applicable because in 1966, Congress adopted

[3] Our decision is consistent with the Supreme Court's requirement of an "unequivocal expression" to sustain a waiver of sovereign immunity. *United States v. Nordic Village, Inc.,* 112 S.Ct. 1011, 1014 (1992). That case concerned an ambiguous waiver of sovereign immunity under § 106 of the Bankruptcy Code, whereas the plain language of § 1346(a)(1) unambiguously covers *all* cases of erroneous tax assessment and collection.

section 7426 of the Internal Revenue Code, which explicitly authorized third-party suits against the government in the case of wrongful government levies. Two other circuits have so reasoned. In *Busse v. United States,* 542 F.2d 421 (7th Cir. 1976), the Seventh Circuit held that a third party who erroneously pays the taxes of another person could not bring a suit for refund under section 1346(a)(1). The court reasoned that *Halton Tractor* must be viewed in light of the fact that the Code at the time did not provide a remedy for nontaxpayers harmed by a wrongful government levy but that the addition of section 7426 addressed this problem and, therefore, section 1346 need not be contorted for equity's sake. *Id.* at 425. In *Snodgrass v. United States,* 834 F.2d 537 (5th Cir. 1987), the Fifth Circuit followed the Seventh Circuit and held that section 1346(a)(1) does not allow suit by a party other than the taxpayer against whom the taxes were assessed. *Id.* at 538.

[3] We are unpersuaded by the Fifth and Seventh Circuits' attempts to distinguish *Parsons* and *Halton Tractor.* Rather, we follow the better-reasoned analysis in *Martin* and reject *Busse* and *Snodgrass,* which fail to give sufficient attention to the plain language of section 1346(a)(1).

Since Williams has standing to sue under section 1346(a)(1), the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

LETTER FROM STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION

1020 N Street, Sacramento, California
(P.O. Box 942879, Sacramento, California 94279-0001)

WILLIAM M. BENNETT
First District, Kentfield

BRAD SHERMAN
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

BURTON W. OLIVER
Executive Director

February 4, 1992

Re: SR AB 12-695827

Jerrold F. Rabin
212 South Kraemer Blvd.
Placentia, CA 92670

Dear Mr. Rabin:

Our records indicate that the above account was closed effective December 31, 1987. The owners are listed as Jerrold F. Rabin and Nicholas Payton-Fearnley. Mr.

Payton-Fearnley continued in the business as a sole proprietor under a new account number.

Attached you will find a copy of the registration record from which I have taken this information.

I hope this information is helpful to you.

Sincerely,

/s/ Sandra Lee Steffen
Sandra Lee Steffen
Authorized Representative

DECLARATION OF PUBLICATION

[ORIGINAL FILED
OCT 08 1989
COUNTY CLERK]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CNSB (Los Angeles)
205 S. Broadway, Ste. 720
P.O. Box 31
Los Angeles, CA 90053

DISSOLUTION OF PARTNERSHIP

MARCO POLLO #1

The undersigned says:

I am over the age of 18 years and a citizen of the United States. I am not a party to and have no interest in this matter. I am a principal clerk of the co-publishers of the Metropolitan News-Enterprise, a newspaper of general circulation in the City of Los Angeles, the County of Los Angeles, and the State of California, as adjudicated in Los Angeles Superior Court Case No. 601165. The notice, a true copy of which is attached, was published on the following date(s):

09/19/89

NOTICE OF DISSOLUTION
OF PARTNERSHIP

Public notice is hereby given that JERROLD F. RABIN and NICHOLAS PAYTON-FERNLEY heretofore doing business under the fictitious firm name and style of MARCO POLLO NO. 1 at 2924 Main Street, City of Santa Monica, County of Los Angeles, State of California, did on the 31st day of December, 1987, dissolve the said partnership and terminate their relationship as partners therein.

Said business in the future will be conducted by NICHOLAS PAYTON-FERNLEY who will pay and discharge all liabilities and debts of the firm and receive all monies payable to the firm.

Further notice is hereby given that the undersigned will not be responsible from this day on, for any obligation incurred by the other(s) in (his)(her)(their) own name(s) or in the name of the firm.

Dated at Santa Ana, California, this Fifth (5th) day of September, 1989.

/s/ JERROLD F. RABIN

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California on 9/19/89 /s/ Linda Call
signature

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SUPREME COURT, U.S.
FILED
OCT 19 1994
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No. 94-395

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-395

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not dispute that a conflict exists among the courts of appeals on the recurring question whether a non-taxpayer may bring a "refund" suit under 28 U.S.C. 1346(a) to recover payments knowingly made to satisfy the tax obligation of another person. As we described in the petition, of the seven courts of appeals that have addressed this question, five have concluded that jurisdiction does *not* exist under this statute for non-taxpayer refund suits while two (including the Ninth Circuit in this case) have concluded that it does. See Pet. 7-10.

Respondent does not deny the existence of this irreconcilable conflict. Instead, respondent contends that, for four separate reasons, the present case is not a satisfactory vehicle for this Court to resolve that

frequently recurring question. None of respondent's rationales is correct.

1. Respondent first suggests that it is unseemly for this question to be addressed here because, in respondent's view, no taxes were in fact owed by anyone (Br. in Opp. 2, 5). Respondent broadly asserts that "[w]e are not in a situation where a party voluntarily pays the taxes of a third party, but rather under duress pays the taxes that *were not correctly determined to be owed* by the third party." *Id.* at 5 (emphasis original).

Respondent's assertion about the merits of the underlying assessments, of course, has no relationship to the jurisdictional issue that the courts below have addressed. Moreover, respondent provides no citations to the opinions below for her assertion, and the record does not support it. This "refund" case was dismissed for want of jurisdiction in the district court (Pet. App. 7a-18a). The court of appeals reversed on the jurisdictional question and remanded for further proceedings (*id.* at 1a-6a). No court has decided whether or not the taxes were "correctly determined to be owed by the third party."

Respondent nonetheless suggests that, *if* the courts below had jurisdiction and *if* the case went to trial on the merits, the government could not establish that the taxpayer (respondent's former husband) actually owed the taxes that respondent paid. Respondent bases this claim on the fact that the government did not dispute that respondent's husband had filed a notice (as of the end of 1987) that he was no longer a partner of the partnership whose activities gave rise to his tax liability (Br. in Opp. 6).

The fact that respondent's husband attempted to disclaim his partnership interest by filing a notice of withdrawal at the end of the second of the three years at issue (Br. in Opp. 6) does not, of course, immunize him

from the federal tax liabilities of the partnership for the periods preceding an effective withdrawal.[1] Moreover, it also has not been established that the notice of withdrawal filed by respondent's husband was sufficient to immunize him from liability for subsequent periods. The mere fact that a partner seeks to withdraw from a partnership does not necessarily establish that the withdrawal was effective, either under state law or under the terms of the partnership agreement. See *Young* v. *Riddell*, 283 F.2d at 910. Respondent plainly errs in flatly stating that none of the taxes assessed had been "correctly determined to be owed" (Br. in Opp. 5; emphasis deleted).

Respondent's husband did not, in any event, challenge the assessments for any of these periods. And, in the carefully defined situations where Congress has allowed *non*-taxpayers to challenge tax liens arising from taxes owed by third persons (see Pet. 11-13), Congress has expressly provided that the underlying tax assessments "shall be conclusively presumed to be valid" (26 U.S.C. 7426(c)). Respondent's effort erroneously to expand the jurisdictional limitations on tax "refund" suits permitted under 28 U.S.C. 1346(a) seeks to circumvent this express, statutory limitation on suits by third parties. In doing so, for the reasons described in detail in the

---

[1] The notice was filed on the last day of 1987. The underlying federal employment tax liabilities of respondent's husband were for wages paid by the partnership from 1986 through 1988. See Br. in Opp. 6-7. It is well settled that a partner is liable for the unpaid taxes of a partnership (see, *e.g.*, *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960); *Underwood* v. *United States*, 118 F.2d 760, 761 (5th Cir. 1941)) and that the partnership's liability for federal employment taxes arises at the time the wages are paid (see 26 U.S.C. 3101(a), 3102(a), 3401(a) (1988 & Supp. IV 1992); *Otte* v. *United States*, 419 U.S. 43, 55 (1974)).

petition (Pet. 13-14), respondent's interpretation of the statute would provide a haven for delay and evasion of tax liabilities.

2. Respondent next asserts that the jurisdictional question on which the courts of appeals have divided should not be addressed in this case because, in respondent's view, respondent did not pay the taxes "voluntarily" (Br. in Opp. 7-8). Respondent asserts that, instead, she paid the taxes under duress (*ibid.*).

That contention is facially erroneous. Congress did not require respondent to pay these taxes; they were due only from her husband (Pet. App. 2a, 8a-9a). Congress also did not require respondent to pay the taxes in order to obtain a release of the federal tax lien on her husband's property (in which she also possessed an interest). Indeed, if respondent had followed the statutory mechanism that Congress provided, there would have been no need for a "refund" suit at all. Under 26 U.S.C. 6325(b)(3), a person whose property becomes subject to a tax lien arising from the activities of a third person may obtain an immediate certificate of discharge of the lien by agreeing with the Secretary to hold the proceeds of a sale of the property "as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property" (*ibid.*). The respective rights of the non-taxpayer and the United States in that fund (and, in particular, the validity of the federal tax lien in the property)[2] are then

[2] Although respondent contends that all of the federal tax liens involved in this case were invalid (Br. in Opp. 8), the court of appeals stated only that it was of the view that the government conceded at argument that one of the several liens filed by the United States "was not valid" (Pet. App. 4a). That issue, of course, has no bearing on the jurisdictional question decided by the court of appeals. Respondent's assertions about the merits of the underlying tax liens and assessments—which the government disputes and which no court has adjudicated—do not afford any basis for avoiding consideration of the necessary and preliminary jurisdictional question that was actually decided below, on which the courts of appeals are manifestly in conflict (see Pet. 7-10).

to be determined in a suit brought in federal district court under 26 U.S.C. 7426(b)(4).

Respondent cannot plausibly suggest that she paid taxes owed by her husband under duress when, under the applicable statutes, she was not required to pay the taxes at all, even in order to conclude her pending sale of the property. She was only required thereafter to submit to an orderly adjudication of her rights, which is not "duress."[3]

3. Respondent next asserts that the recurring conflict on this important jurisdictional question should not be addressed or resolved in this case because two district court decisions have recently disagreed with the government's position (Br. in Opp. 8-10). Several other district courts, and five of the courts of appeals, however, have agreed with the government's interpretation of this statutory scheme. See Pet. 7-10, 11-13. The fact that several recent decisions can be found on both sides of this recurring question merely emphasizes the need for this Court's resolution of the matter.

4. Respondent's final assertion is that the government's petition in this case sets forth a "novel" analysis of the statutory scheme that departs from the analysis that the government employed in the courts below and in previous briefs in other cases (Br. in Opp. 8). That contention is both inadequate and inaccurate.

[3] See, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d 408, 411 (6th Cir. 1934); Pet. 10-12 & n.2.

It is inadequate because the government unquestionably properly raised the jurisdictional issue in this case. See Pet. App. 1a-6a, 7a-18a. Even if our briefing of that question in the petition emphasizes additional portions of the statutory scheme in explaining why the language of the statute supports jurisdiction only for suits brought by "taxpayers," that does not alter the question presented for disposition by this Court.

The government has long contended that only a "taxpayer" may bring a "refund" suit under this jurisdictional statute.[4] The government's analysis has been adopted in numerous decisions holding that a non-taxpayer may not bring suit under 28 U.S.C. 1346(a)(1). See Pet. 8, 10, citing, *e.g.*, *Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp.* v. *United States*, 22 F.3d 741, 743 (7th Cir. 1994); *Snodgrass* v. *United States*, 834 F.2d 537, 539 (5th Cir. 1987); *Phillips* v. *United States*, 346 F.2d 999, 1000 (2d Cir. 1965); *Luce* v. *United States*, 444 F. Supp. 347, 348 & n.1 (W.D. Mo. 1977). See also *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 589-590 (Ct. Cl. 1972). Moreover, the same statutory provisions described in the petition were also described in the briefing below in this case, where the government pointed out that respondent did not qualify as a "taxpayer" authorized to bring a "refund" suit under the applicable statutes (U.S. C. A. Br. 27 n.18).

This case thus squarely frames and properly presents the important, recurring question whether a non-

[4] The fact that a non-taxpayer, such as respondent, files an administrative claim for adjustment of taxes, or a refund claim, does not convert her into the "taxpayer" for this jurisdictional purpose. See *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 590 (Ct. Cl. 1972), quoting *Ray* v. *United States*, 453 F.2d 754, 758 (Ct. Cl. 1972).

taxpayer may bring a "refund" suit to recover taxes knowingly paid on behalf of another party. For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1994

Supreme Court, U.S.
FILED
DEC 8 1994
OFFICE OF THE CLERK

(4)

No. 94-395

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 1, 1994
CERTIORARI GRANTED OCTOBER 31, 1994

26 pp

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U.S. DISTRICT COURT
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(LOS ANGELES)

Civil Docket for Case #: 91-CV-5286

LORI WILLIAMS, RABIN, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
9-30-91	1. Complt. Issd sums Demand for J/T Case may be ref'd to U.S. Mag Judge Eick for discvry.
10/30/91	2. Note of change of address of cnsl for petitioner. pltf.
11/4/91	3. Ret of orig sums; P/S of S/C on Lisa Bracamontes, auth agent for scv of proc for USA by persoanl svc on 11/28/91.
12/26/91	4. ANSWER to complt. Deft. USA
1/21/92	5. Joint rpt of early mtg. Deft
2/5/92	6. CRTS ORD: That PTC is set for 6/1/92 @ 10am ctrm 9, Trial is set for 6/16/92 @9am
2/24/92	7. CRTS ORD: That case is set for Stat/Sttlmt Conf by phone conf on 3/5/92 @4pm.
2-27-92	8. Jnt stat rpt.
3/5/92	9. Mo: Off the record call from chambers. PTC is reset for 6/8/92 @10am w/L.R. 9 papers to be fld by 6/3/92. Cnsl may set their own discov cutoff date.C/R: None

DATE	PROCEEDINGS
4/28/92	10. Ntc of mot & mot for S/J. deft. Rtnbl 6/1/92 @10am ctrm 9 LODGED Prop stmt & jdmt ?
4/29/92	11. Ntc of rescheduling mot for S/J to 6/1/92 @10am ctrm 9. dft.
5/11/92	12. Ntc of mot & x-mot for S/J. plf. Rtnbl 6/8/92 @10am ctrm 9 LODGED Prop Stmt & S/J. plf
5-7-92	13. Ex-parte plf's mot for cont of dft's mot for S/J; ex-parte pltf's mot for cont of trial. plf LODGED prop ORD. (Fwd'd to CRD)
5-8-92	14. ORD to cont dft's mot for S/J to 6-8-92, 10AM. opp papers by the plf will be due NLT 5-25-92; pltf files a cross-mots for S/J, such mot must be srvd by mail NLT 5- or if personally srvd NLT 5-18-92. Tht the trial this matter contd to 6-30-92, 9AM. & PTC contd to 6-22-92, 10AM.
5/22/92	15. Opp to mot for S/J. plf LODGED Prop ord (Fwd to CRD)
5/26/92	16. Opp to x-mot for S/J. dft
6/2/92	17. Reply to opp to the mot for S/J. dft
6/8/92	18. MO: That the mots for S/J are taken under subm. The PTC & trial dates are VACATED. C/R: S. Seffens
9/2/92	19. CRTS ORD: That pltfs mot for S/J is DENIED. Dfts mot for S/J is GRANTED. (ENT 9/3/92) MD JS-6 Mld cpys/ntc ENTERED ON ICMS ——
9-10-92	20. PLF. FLD NTC OF APP TO THE 9TH C/A FRM CRTS ORD FLD ON 9-2-92. FEES BILLED.
9/18/92	21. Trans desig & ordng form.

DATE	PROCEEDINGS
11/2/92	22. Receipt for rptrs trannsc had on 6/8/92.
1/25/93	LODGED cc Ord frm 9th CCA granting govts mot for ext of time to file ans brief.
3/23/93	FWD to 9th CCA (1) vol orig rptrs transc
2/8/94	FWD to 9th CCA (2) vols orig clks file.
2/8/94	FWD to 9th CCA (2) vols orig clks file.
6/15/94	LODGED cc ord frm 9th CCA reversing & remanding.
6/16/94	23. M.O.: Flng & spreading of mandate set for 6/27/94 @10am.
6-27-94	24. MO—tht the jgm of the 9th CCA is hereby fld and spread the crt finds there is jurisdiction; should the plf bring the actn, and based on the ptys stip the jgm will be ent in favor of the plf; the crt is informed tht the dft may ptn for Certerori; the crt ords a conf call for 8-19-94 @ 12:00 noon for a rpt on tht process. (ENT 7-7-94). C/R—Rosa Toribach.
7/7/94	25. Ntc of change of address. plf
*6/22/94	26. MO: That time of fing & spreading of mandate frm (th CCA on 6/27/94 will be 2:15 C/R: None
8/8/94	27. Ntc of stat of actn; req crt tk phone conf off cal. dft, USA
8/19/94	28. MO: conf. call of record. Crt ord actn stayed peding the fing of writ & ruling on writ by the U.S. Supreme Court. Fur conf call set for 11/17/94 @noon. C/R:N/A
7/8/94	RCVD frm 9th CCA (2) vol orig file. RCVD frm 9th CCA (1) vol rptrs transc dtd 6/8/92
11/17/94	29. M.O.: Conf call. U.S. Supreme Court has taken case. Action stayed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-56207

LORI RABIN WILLIAMS, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
10/1/92	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS due 10/15/92 for Philip Garrett Panitz; appellant's designation of RT is due 9/21/92; appellee's designation of RT is due 9/30/92; appellant shall order transcript by 10/13/92; court reporter shall file transcript in DC by 11/10/92; certificate of record shall be filed by 11/17/92; appellant's opening brief is due 12/28/92; appellees' brief is due 1/26/93; appellants' reply brief is due 2/9/93; [92-56207] (dr)
10/19/92	Filed Philip Garrett Panitz for Appellant Lori Rabin Williams Civil Appeals Docketing Statement served on 10/15/92 (to CONFATT) [92-56207] [92-56207] (sw)
11/4/92	Rec'd. notice of appearance of Kevin M. Brown & Gary Allen. (Withdrew as counsel: attorney Sandra R. Brown for USA [92-56207] (jlc)
11/6/92	Case released from Pre-Briefing Conference program. (jr)

DATE	PROCEEDINGS
12/28/92	Filed original and 15 copies Appellant Lori Rabin Williams opening brief (Informal: n) 18 pages and five excerpts of record; served on 12/23/92 [92-56207] (sw)
1/22/93	Filed motion & order (Dpty Clk—cag): The ct is in receipt of the Govt's mtn for an ext. of time in which to file the ans brief. The mtn is granted; ans brief due 2/16/93; opt. reply due 14 days from svc of the ans brief. Ct records do not currently reflect that the dc has issued the COR. Aplt shall monitor the issuance of the cert.; absence of the cert. will block resolution of the appeal. (Motion recvd 1/19/93) [92-56207] (sw)
2/19/93	Filed original and 15 copies appellee USA's 37 pages brief, served on 2/16/93. [92-56207] (sa)
2/25/93	Filed certificate of record on appeal RT filed in DC 11/02/92 [92-56207] (rmw)
3/5/93	10 day oral extension by phone of time to file Appellant's reply brief. [92-56207] appellants' reply brief due 3/15/93; (mag)
3/15/93	Filed original and 15 copies Lori Rabin Williams reply brief, (Informal: n) 11 pages; served on 3/12/93. [92-56207] (sa)
3/26/93	Filed, as of 2/25/93, certified record on appeal in 1 Vol. (total): 1 RTs (orig) [92-56207] [92-56207] (gva)
11/4/93	Calendar check performed [92-56207] (mw)
11/8/93	Received ltr from USA dtd 11/4/93 re: additional citations, * * * * * [92-56207] (rc)
12/16/93	Calendar check performed [92-56207] (dd)
1/6/94	Calendar materials being prepared. [92-56207] [92-56207] (dd)

DATE	PROCEEDINGS
1/12/94	CALENDARED: Pasadena March 10, 1994 9:00 a.m. Courtroom 3 [92-56207] (dd)
3/10/94	ARGUED AND SUBMITTED TO Harry PREGERSON, Diarmuid F. O'SCANNLAIN, Ferdinand F. FERNANDEZ [92-56207] (dr)
5/9/94	Received ltr dated 5/6/94 from Gary Allen re: additional citations, pursuant to FRAP 28(j); served on 5/6/94 (Panel) [92-56207] (gva)
5/19/94	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harry PREGERSON; Diarmuid F. O'SCANNLAIN, author; Ferdinand F. FERNANDEZ.) FILED AND ENTERED JUDGMENT. [92-56207] (sa)
5/23/94	Rec'd notice of change of address from Philip Garrett Panitz for Aplt dated 5/17/94. (Casefiles) [92-56207] (gva)
5/27/94	Filed Appellant Lori Rabin Williams bill of costs, served on 5/26/94 [92-56207] (tsp)
6/10/94	MANDATE ISSUED costs taxed against aple for 770.60c [92-56207] (crw)
8/17/94	Filed Supreme Court order (SC Date: 8/9/94) granting an ext to file petition for writ of certiorari to 9/16/94. [92-56207] (jr)
9/14/94	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-395 filed on 9/1/94. [92-56207] (crw)
11/21/94	Filed Supreme Court order (SC Date: 10/31/94): The petition herein for a writ of certiorari to the USCA for the the 9th Circuit is granted (Panel) [92-56207[(gva)

[Filed Apr. 28, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 91-5286 WMB (Ex)

LORI (RABIN) WILLIAMS, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: June 1, 1992

The Motion For Summary Judgment for the United States of America came on for hearing before the Honorable Wm. Matthew Byrne, Jr., United States District Judge. Based on the pleadings filed in connection with the motion and all matters properly a part of the record, the Court finds the following uncontroverted facts and makes the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. At one time plaintiff Lori (Rabin) Williams and Jerrold Rabin were husband and wife.

2. In April 1987, Jerrold Rabin (hereinafter "taxpayer-Rabin") and plaintiff purchased real estate located at 15915 Alcima, Pacific Palisades, California.

3. On October 20, 1988, taxpayer-Rabin and plaintiff executed a transfer agreement in which taxpayer-Rabin transferred all of his interest in the Alcima property to the plaintiff as her separate property.

4. In return, the plaintiff agreed to assume the following liabilities:

(1) A trust deed in favor of the Home Savings of America securing a loan with an unpaid balance of approximately $113,300.00. (Both plaintiff and taxpayer-Rabin jointly signed the deed on May 7, 1975.)

(2) A trust deed in favor of the First Charter Bank securing a loan with unpaid balance in the approximate amount of $325,000.00. (Both plaintiff and taxpayer-Rabin jointly signed the loan agreement in August 1985.)

(3) A judgment lien in favor of the F.D.I.C. in the approximate amount of $210,000.00.

5. Additionally, pursuant to this agreement, taxpayer-Rabin agreed to indemnify the plaintiff for payment of any other liens on the Alcima property, and that, subject to reimbursement by the plaintiff upon sale of the subject property, he would continue to pay the installment loan payments, the homeowners insurance premiums, all property tax assessments, and all repair, maintenance, and cleaning charges in connection with the property.

6. On October 25, 1988, taxpayer-Rabin recorded a quitclaim deed, with zero documentary transfer tax and title taken in the name of "Lori Williams, an unmarried woman."

7. On or about May 9. 1989, plaintiff entered into an escrow agreement to sell the Alcima property.

8. On June 26, 1989, the Internal Revenue Service recorded a nominee lien in the name of Lori Rabin aka Lori Williams as nominee, agent, holder of beneficial interest for trustee, transferee, or alter-ego of Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., and any right, title or interest that Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., may have or may acquire in that property described therein.

9. On or about July 3, 1989, the escrow closing shows that the following creditors were paid through escrow:

(1) Home Savings of America in the amount of $112,992.29 on the basis of a trust deed recorded on May 7, 1975;

(2) First Charter Bank in the amount of $340,903.82 on the basis of a trust deed recorded on September 3, 1985;

(3) Edith Rabin (taxpayer-Rabin's mother) in the amount of $100,000.00 on the basis of a trust deed recorded on April 14, 1988;

(4) Estate of Aileen Buckley (taxpayer-Rabin's sister) in the amount of $36,000.00 on the basis of a trust deed recorded on April 14, 1988;

(5) Edith Rabin (taxpayer-Rabin's mother) in the amount of $40,000.00 on the basis of a trust deed recorded on April 14, 1988;

(6) The FDIC in the amount of $227,327.47 on the basis of a judgment lien recorded on January 13, 1986;

(7) California Employment Development Department in the amount of $2,801.58 on the basis of two liens recorded against Arthur Lee Sloan/Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(8) California Employment Development Department in the amount of $672.12 on the basis of two liens recorded against Arthur Lee Sloan/Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(9) The Internal Revenue Service in the amount of $41,937.04 on the basis of three Notices of Federal Tax Lien recorded against Marco Pollo 1/Jerrold Rabin on November 10, 1988, June 22, 1989, and July 24, 1989; and,

(10) The Internal Revenue Service in the amount of $1,308.30 on the basis of a Notice of Federal Tax

Lien recorded against Rabin Drilling Program 1983-A Ltd. on September 21, 1987

10. On January 19, 1989, the plaintiff filed a petition for dissolution of marriage in the Superior Court of California.

11. On March 19, 1990, a Judgment was entered dissolving the marriage.

12. On December 31, 1987, Jerrold Rabin registered with the State Board of Equalization a notification that he was no longer a partner with Marco Pollo 1, partnership.

13. Plaintiff is not the taxpayer.

14. Any conclusions of law deemed more appropriately designated as an uncontroverted fact is incorporated here as an uncontroverted fact.

CONCLUSIONS OF LAW

1. 28 U.S.C. § 1346(a)(1) is a waiver of sovereign immunity which must be construed narrowly. See, *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976).

2. Under 28 U.S.C. § 1346(a)(1), only a "taxpayer" can bring a refund suit. See, *Snodgrass v. United States*, 834 F. 2d 537, 539 (5th Cir. 1987); *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976); *Eighth Street Baptist Church, Inc. v. United States*, 431 F. 2d 1193, 1194 (10th Cir. 1965); *Phillips v. United States*, 346 F. 2d 999, 1000 (2d Cir. 1965); *McCune v. United States*, 36 A.F.T.R. 2d 75-5487 (C.D. Cal. 1975)

3. The "taxpayer" is the person against whom the tax was assessed. See, *Busse v. United States*, 542 F. 2d 421, 424-25 (7th Cir. 1976).

4. A person who is not liable for a tax but pays it to remove a lien against her property may not sue for a refund under 28 U.S.C. § 1346(a)(1). *Busse v. United States*, 542 F.2d 421, 424-25 (7th Cir. 1976); *Hummel v United States*, 494 F.Supp. 1003 (S.D. Iowa 1980).

5. The statutes allow a non-taxpayer to file a wrongful levy suit pursuant to 26 U.S.C. § 7426 and 28 U.S.C. § 1346(e), as noted above, a quiet title action under 28 U.S.C. § 2410, or to apply for a certificate of discharge of the tax lien pursuant to 26 U.S.C. § Section 6325 (b)(3). See *Busse v. United States*, 542 F.2d 421, 425 (7th Cir. 1976).

6. A non-taxpayer does not have a remedy against the United States to recover the payment made on behalf of the taxpayers to remove an encumbrance from the title to her land. See *Busse v. United States*, 542 F.2d 421, 425 (7th Cir. 1976).

7. Unless the person suing, pursuant to 26 U.S.C. § 1346(a)(1), is the one who was assessed and potentially owes the tax, no standing exists. See *Home Indemnity Co. v. Brennan*, 430 F.Supp. 828, 830 (S.D.N.Y. 1977).

8. A non-taxpayer may have a cause of action against the taxpayer, but she has no valid claim against the United States. *See Fidelity & Casualty Co. of New York v. United States*, 203 Ct. Cl. 484, 490 F.2d 960, 966 (Cl.Ct. 1974).

9. *United States v. Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958) has no viability following the 1966 enactment of the wrongful levy provisions of 26 U.S.C. § 7426. *See* Senate Report No. 1708, 89th Cong., 2d Sess., *reprinted in* 1966-3 *United States Code Cong. & Adm. News*, at 3750; *Busse v. United States, supra*, at 425; *Arndt v. United States*, 493 F.Supp. 552, 553 (S.D. Tex. 1980); *Hummel v. United States, supra*, at 1005.

10. Section 1346(a)(1) (26 U.S.C.) does not provide a waiver of sovereign immunity as to the United States in this action.

11. Section 1346(a)(1) (26 U.S.C.) does not provide this Court with a grant of subject matter jurisdiction for this action.

12. There being no genuine issues as to any material fact and defendant being entitled to judgment as a matter

of law, summary judgment shall be entered in favor of defendant. Rule 56, Federal Rules of Civil Procedure.

13. Any uncontroverted fact deemed more appropriately designated as a conclusion of law is incorporated here as a conclusion of law.

DATED:————————

/s/ William Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
MASON G. LEWIS
Assistant United States Attorney
Chief, Tax Division

/s/ Sandra R. Brown
SANDRA R. BROWN
Assistant United States Attorney
Attorneys for United States
of America

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[Lodged May 11, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

————

[Title Omitted in Printing]

————

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Date: June 8, 1992
Time: 10:00 a.m.
Courtroom: 9
312 North Spring Street
Los Angeles, California

The Motion For Summary Judgment for the United States of America came on for hearing before the Honorable Wm. Matthew Byrne, Jr., United States District Judge. Based on the pleadings filed in connection with the motion and all matters properly a part of the record, the Court finds the following uncontroverted facts and makes the following conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. At one time Plaintiff Lori (Rabin) Williams and Jerrold Rabin were husband and wife.

2. In April 1987, Jerrold Rabin and Plaintiff purchased real estate located at 15915 Alcima, Pacific Palisades, California.

3. On October 20, 1988, Jerrold Rabin and Plaintiff executed a transfer agreement in which Jerrold Rabin transferred all of his interest in the Alcima property to the Plaintiff as her separate property.

4. In return, the Plaintiff agreed to assume the following liabilities:

(1) A trust deed in favor of the Home Savings of America securing a loan with an unpaid balance of aproximately $113,300.00. (Both Plaintiff and Jerrold Rabin jointly signed the deed on May 7, 1975.)

(2) A trust deed in favor of the First Charter Bank securing a loan with unpaid balance in the approximate amount of $325,000.00. (Both Plaintiff and Jerrold Rabin jointly signed the loan agreement in August 1985.)

(3) A judgment lien in favor of the F.D.I.C. in the approximate amount of $210,000.00.

5. Additionally, pursuant to this agreement, Jerrold Rabin agreed to indemnify the Plaintiff for payment of any other liens on the Alcima property, and that, subject to reimbursement by the Plaintiff upon sale of the subject property, he would continue to pay the installment loan payments, the homeowners insurance premiums, all property tax assessments, and all repair, maintenance, and cleaning charges in connection with the property.

6. On October 25, 1988, Jerrold Rabin recorded a quitclaim deed, with zero documentary transfer tax and title taken in the name of "Lori Williams, an unmarried woman."

7. On or about May 9, 1989, Plaintiff entered into an escrow agreement to sell the Alcima property.

8. On June 26, 1989, the Internal Revenue Service recorded a nominee lien in the name of Lori Rabin aka Lori Williams as nominee, agent, holder of beneficial interest for trustee, transferee, or alter-ego of Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., and any right, title or interest that Marco Pollo 1, a partnership, Jerrold Rabin, Gen. Ptr., may have or may acquire in that property described therein.

9. On or about July 3, 1989, the escrow closing shows that the following creditors were paid through escrow:

(1) Home Savings of America in the amount of $112,992.29 on the basis of a trust deed recorded on May 7, 1975;

(2) First Charter Bank in the amount of $340,-903.82 on the basis of a trust deed recorded on September 3, 1985;

(3) Edith Rabin (Jerrold Rabin's mother) in the amount of $100,000.00 on the basis of a trust deed recorded on April 14, 1988;

(4) Estate of Aileen Buckley (Jerrold Rabin's sister) in the amount of $36,000.00 on the basis of a trust dede recorded on April 14, 1988;

(5) Edith Rabin (Jerrold Rabin's mother) in the amount of $40,000.00 on the basis of a trust deed recorded on April 14, 1988;

(6) The FDIC in the amount of $227,327.47 on the basis of a judgment lien recorded on January 13, 1986;

(7) California Employment Development Department in the amount of $2,801.58 on the basis of two liens recorded against Arthur Lee Sloan/ Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(8) California Employment Development Department in the amount of $672.12 on the basis of two liens recorded against Arthur Lee Sloan/ Jerrold F. Rabin/Marco Pollo on September 22, 1988 and April 27, 1989, respectively;

(9) The Internal Revenue Service in the amount of $41,937.04 on the basis of three Notices of Federal Tax Lien recorded against Marco Pollo 1/Jerrold Rabin on November 10, 1988, June 22, 1989, and July 24, 1989; and,

(10) The Internal Revenue Service in the amount of $1,308.30 on the basis of a Notice of Federal Tax Lien recorded against Rabin Drilling Program 1983-A Ltd. on Sepytember 21, 1987.

10. On January 19, 1989, the Plaintiff filed a petition for dissolution of marriage in the Superior Court of California.

11. On March 19, 1990, a Judgment was entered dissolving the marriage.

12. On December 31, 1987, Jerrold Rabin registered with the State Board of Equalization a notification that he was no longer a partner with Marco Pollo 1, partnership.

13. Plaintiff is not the taxpayer.

14. Any conclusions of law deemed more appropriately designated as an uncontroverted fact is incorporated here as an uncontroverted fact.

Plaintiff hereby incorporates by reference all of the Exhibits attached to defendant's Motion for Summary Judgment as evidence for the uncontroverted facts set forth above.

CONCLUSIONS OF LAW

1. Under U.S.C. Section 1346(a) a refund suit can be maintained by a person against whom an internal revenue tax has been erroneously or illegally collected, not just a person against whom such a tax has been erroneously or illegally assessed. *Mona Martin v. United States*, 895 F.2d 992 (4th Cir. 1990); *United States v. Halton Tractor Company*, 258 F.2d 612 (9th Cir., 1958); *Parsons v. Anglin*, 143 F.2d 534 (9th Cir., 1944); *David v. United States*, 551 F.Supp. 850 (C.D. Cal. 1982) *Adams v. United States*, 380 F.Supp. 1033 (D. Mont. 1974); *Noonis v. United States*, 576 F. Supp. 853 (U.S.D.C. Wes.Dis.Texas 1983).

2. The enactment of 26 U.S.C. Section 7426 has not preempted the Ninth Circuit Court of Appeals decisions

in *United States v. Halton Tractor Co.*, 258 F.2d 612 (9th Cir., 1958) and *Parsons v. Anglin*, 143 F.2d 534 (9th Cir., 1944) on the issue of the standing of a third party to sue for a refund. See *David v. United States*, 551 F. Supp. 850 (C.D. Cal. 1982).

3. The enactment of 26 U.S.C. § 7426 was intended to expand the rights of third parties to maintain a refund suit. See Senate Finance Committee Report No. 1708, H.R. 11256, reprinted in 1966-3 IRS Cumulative Bulletin 876 et. seq.

4. There is no basis under 28 U.S.C. § 1346 for distinguishing between third parties against whom taxes were erroneously or illegally collected based on their perception as to whether or not they actually owed the tax at the time of collection. *Mona Martin v. United States*, 895 F.2d 992 (4th Cir., 1990).

5. The plaintiff has standing in this action pursuant to the authority of Title 28 U.S.C. 1346(a)(1) to sue for a refund of taxes.

6. Title 28 U.S.C. 1346(a)(1) provides a waiver of sovereign immunity as to the United States in the matter.

7. There being no genuine issues as to any material fact and plaintiff being entitled to judgment as a matter of law, summary judgment shall be entered in favor of plaintiff. Rule 56, Federal Rules of Civil Procedure.

Dated: ————

WM. MATTHEW BYRNE, JR.
United States District Judge

Presented by:

LAW OFFICES OF STAKER & GOSE

/s/ Philip Garrett Panitz
PHILIP GARRETT PANITZ
Attorney for the Plaintiff

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

June 8, 1992

* * * *

[3] THE CLERK: Item 7, CV-91-5286, Lori Williams versus the United States. Cross-motions for summary judgment.

Counsel, state your appearances, please.

MR. PANITZ: Your Honor, Philip Garrett Panitz for the plaintiff, Lori Rabin Williams.

MS. BROWN: Good morning, Your Honor. Sandra Brown, Assistant United States Attorney, on behalf of the United States.

THE COURT: I feel like we are sort of at a stop-off station for the final resolution of this case. It's a good issue, an issue that the Ninth Circuit's going to have to address.

I am a little bit concerned about it only to this extent. You have only got $40,000 involved here. I know how difficult it is to settle tax cases, but if there is any possibility—I feel a little badly that the plaintiff, no matter what happens, is going to have to pay the expense of finding out what the Court of Appeals is going to do, and I think there's a fair possibility, that you may even have to go further than that to get the final answer. In this case, it doesn't warrant it.

If you think there is any possibility of resolving [4] it, I would suggest you try to do so. If there is not, we will just go ahead and take your best shot at it.

MR. PANITZ: Your Honor, I think any possible settlement in this case would have to come after your ruling in this matter on the summary judgment motions.

THE COURT: I doubt that frankly, but regardless—obviously, if I rule for the Government, there won't be any settlement discussions. If I rule for you, there possibly would be some, but they don't want that decision sitting out there. They have got a couple of old Ninth Circuit cases that they are—and the Fourth Circuit case. I think the last thing the Government is going to want is any opinions out there—even from the District Court judge—that is contrary to their position that's eventually going to be heard.

MR. PANITZ: I think they substantial take a risk, though, in taking this case up to the Ninth Circuit, essentially taking a risk that Mona Martin [phonetic] becomes the law in the Ninth Circuit.

THE COURT: Well, anyway, as long as you all have explored it. I just wanted to give you that opportunity.

Let's go ahead then. The question obviously is whether there is a waiver of sovereign immunity for a nontaxpayer.

MR. PANITZ: That's correct, Your Honor, and I [5] believe both sides in their motions have essentially stipulated that the taxes were erroneously collected. It is just a question of whether or not there is a standing under 1346(a)(1).

THE COURT: There is no question that the equities are with the plaintiff in the case, not having any way to remedy the wrong that might have been perpetrated upon it, but no one is going to ever say that there is any equities in the tax law, so from that, though, really comes the question should she be given some remedy by a somewhat nonexplicit waiver of sovereign immunity to be able to pursue her claim against the government?

In this particular case, the relief that has been—the statutory relief that has been given doesn't really apply, so her only relief is to be able to come into court and file this refund action. The problem that you have is that the Supreme Court is obviously now tightening sovereign immunity cases. They—you have got all of the Circuits saying the Fourth. That is contrary to your position.

MR. PANITZ: Your Honor, I don't believe that's the case.

THE COURT: The Fourth is now—you like that Fourth Circuit opinion?

MR. PANITZ: The Fourth Circuit opinion is right on point.

[6] THE COURT: Right on point but maybe not right on the law.

MR. PANITZ: Well, we disagree with that.

THE COURT: What happened on that as far as cert.? Is there an effort to get cert. on that?

MS. BROWN: No, Your Honor.

THE COURT: Okay. Go ahead.

MR. PANITZ: You referred to the Supreme Court narrowing the construction of 1346. Perhaps you're referring to the Donelan [phonetic] case, United States versus Donelan. In that particular case, however, the Court found that it was not jurisdiction because the plaintiff in that case failed to do certain specific things, such as filing an administrative claim for refund.

THE COURT: How about in Nordic Village? Does the unequivocal expression of elimination of sovereign immunity, as you insist upon is the expression in the statutory text—"if clarity does not exist there, it cannot be supplied in that case by a committee report."

MR. PANITZ: Your Honor, as far as explicit language, nothing could be more explicit than 1346 when it says, "any Internal Revenue tax which is alleged to have been erroneously, or illegally collected." The parties stipulated in this case that the taxes are erroneously, illegally collected.

[7] THE COURT: There's no question about that. It's a question of whether a nontaxpayer can do anything about it.

MR. PANITZ: But in 1346, it doesn't limit it just to a taxpayer, Your Honor. 1346 doesn't expressly say, "This statute is jurisdictional only for taxpayers."

If you were to read the opinion in Newness, the Eastern District of Texas, they go through a whole litany of cases that have been decided on this issue, and in their opinion, the Fourth, the Fifth, the Sixth, and the Ninth Circuits have all held for the taxpayer in this matter.

THE COURT: All right. Anything additional, or do you want me to have the Government argue, and then you can respond?

MR. PANITZ: Yes, Your Honor.

MS. BROWN: I don't think it needs to be an extensive argument on behalf of the Government. I think it comes down basically to whether or not the sovereign immunity had been waived, and the Government's position is, no, in agreement with the Seventh Circuit, the Fifth Circuit, and the Second Circuit. It comes down to whether or not there is a waiver of sovereign immunity for nontaxpayers under 1346.

Looking at the Supreme Court—and they have repeatedly and repeatedly emphasized that it is a narrow waiver of sovereign immunity. I agree with the Court that the equities are not in our favor, but it is the law we have to [8] look at. In this case, the Second Circuit, the Fifth Circuit, and the Seventh Circuit decisions should be followed by this Court.

THE COURT: All right. Anything additional?

MR. PANITZ: Well, as far as the Fifth Circuit, Your Honor, the Newness case was decided in the Fifth Circuit and cites favorable case law in the Fifth Circuit, so I dispute whether the Fifth Circuit is against us.

There is a whole list of cases in the Fifth Circuit that are apparently in conflict, but I believe that higher cases in that Circuit were in our favor. I think, though, what is most important to this Court is which way is the Ninth Circuit going to go, and I think that the Ninth Circuit—

THE COURT: If you expect that I'm going to anticipate which way the Ninth Circuit is going to go, you're going to have to go up with me and poll the judges. I don't mean that derogatorily, but I really don't think, frankly, it is going to be a question of what the Ninth Circuit does. I agree that there aren't very many cases is the only reason the Supreme Court wouldn't take it, but there is going to be a clear split.

MR. PANITZ: Yes, I agree with Your Honor. I believe there is going to be a clear split in the Circuits. But as far as the Ninth Circuit, I believe that the right way to go in this case is to do equity to the taxpayer. Here the [9] taxpayer's taxes were erroneously collected. There's no doubt that she didn't owe the tax.

THE COURT: I know this wouldn't happen in the Ninth Circuit, but in some Circuits there might be one group of judges that are very concerned about the equity to the taxpayer, and there might be another group of judges that are terribly concerned about a strict ruling of sovereign immunity, and so it's very difficult to tell what the Court of Appeals is going to do.

MR. PANITZ: But in this particular case, the taxpayer has absolutely no remedy if it is not under 1346.

THE COURT: I understand that. There is no remedy here. The Government concedes there's no remedy here. Congress has attempted to create some remedy, but it doesn't apply here. There is no question that the plaintiff here is left without a remedy.

MR. PANITZ: If this Court were to rule against her, yes, that would be the case. The Fourth Circuit chose to rule in her favor, as did the Eastern District of Texas in the Fifth Circuit. In a case such as this, plaintiff should be extended jurisdiction under 1346(a)(1).

THE COURT: Do we just extend jurisdiction and find a waiver of immunity in all cases where the plaintiff is left without a remedy?

MR. PANITZ: No, Your Honor, only in cases where [10] there is a stipulation that the tax has been erroneously collected.

THE COURT: Why don't we just forget taxes? In any waiver of sovereign immunity case, there are many instances where if there is not a waiver the plaintiff has no remedy against the United States.

MR. PANITZ: In this case, we can look specifically to the language of the statute in 1346 and see where the language states that, "There is jurisdiction conveyed if the tax was erroneously collected and only in that instance."

THE COURT: You think that is an explicit statement for a nontaxpayer?

MR. PANITZ: Your Honor, if Congress wanted to limit that statute, they could have easily added the language.

THE COURT: That's the other side of the argument.

MR. PANITZ: But they did so in 7426.

THE COURT: Yes, I know, but you are saying because they didn't say something, they must have meant to confer standing, and that appears to be what the Supreme Court is saying you can't do. It has to be an explicit expression.

MR. PANITZ: But, Your Honor, in 7426 they expressly state "taxpayer." In 1346 and in 7422—

THE COURT: They don't say it.

MR. PANITZ: —it's a person, a person who is erroneously collected against.

[11] In this case, Ms. Rabin-Williams was erroneously collected against.

THE COURT: Okay, I am going to give you a written memorandum on this since I think you will probably have it somewhere else to deal with.

Did we get a trial date on this?

MS. BROWN: Yes, we do, Your Honor.
THE COURT: What's the trial date?
MR. PANITZ: June 30.
THE COURT: I am going to vacate the trial date.
MR. PANITZ: Thank you.
MS. BROWN: Thank you, Your Honor. And you will give us a new trial date also, Your Honor?
THE COURT: If there is going to be a new trial date, I'll state it in the Order. It seems to me the matter is resolved on these—
MR. PANITZ: I believe Counsel agrees on that matter, Your Honor. This is purely a legal issue.
THE COURT: The only thing that I wish it were—well, let me get a statement from both of you on the record. I wish it were on stipulated facts, rather than cross-motions for summary judgment. It's sort of hard to avoid that in the Circuit if it's on stipulated facts.
I assume that you both believe that under either one's theory of the case, there is no triable issue of fact.
[12] MS. BROWN: I'm sorry, I didn't catch—there is no what of facts?
THE COURT: Triable issue of fact.
MS. BROWN: Correct, Your Honor.
MR. PANITZ: I think we have a full stipulation of the facts in the case, Your Honor.
MS. BROWN: I believe if you look very closely, their facts are copied word for word from our facts.
THE COURT: But you call it Cross-Motions for Summary Judgment, so I assume that while it is labeled that, we agree now that this is really a stipulated fact trial tried on the facts as set forth in the memorandum.
MR. PANITZ: That's correct, Your Honor. We are just arguing over standing.
THE COURT: Okay, fine. Thank you very much.
MS. BROWN: Thank you very much, Your Honor.

(Proceedings adjourned.)

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Supreme Court, U.S.
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No. 94-395

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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27 pp

QUESTION PRESENTED

Whether a tax refund suit may be brought under 28 U.S.C. 1346(a)(1) to obtain a refund of amounts paid by respondent to the Internal Revenue Service to obtain the release of a federal tax lien on her property when the lien arose out of the tax liabilities of a third person.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-395

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 24 F.3d 1143. The opinion of the district court (Pet. App. 7a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1994. On August 9, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including September 16, 1994. The petition for a writ of certiorari was filed on September 1, 1994, and was granted on October 31, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1346(a) provides, in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States * * *.

2. 28 U.S.C. 2410(a) provides, in relevant part:

> * * * [T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to * * *
>
> * * * * *
>
> real or personal property on which the United States has or claims a mortgage or other lien.

3. 26 U.S.C. 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

4. 26 U.S.C. 7422 provides, in relevant part:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (b) Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

5. 26 U.S.C. 6325(b)(3) provides:

> Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge [of federal tax lien] of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the Secretary, the proceeds of

such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.

6. 26 U.S.C. 7426 provides, in relevant part:

(a)(1) If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

* * * * *

(a)(3) If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

* * * * *

(b)(4) If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section

6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

7. 26 U.S.C. 7701(a)(14) provides:

The term "taxpayer" means any person subject to any internal revenue tax.

STATEMENT

This case concerns a payment made to the United States by respondent to remove a federal tax lien from property held in her name. The lien arose from taxes owed by her husband, Jerrold Rabin, who owned the property with respondent as joint tenant at the time the taxes were first assessed.

1. In April 1975, before respondent and Rabin were married, they purchased real estate in Pacific Palisades, California, as joint tenants. More than a decade later, in June 1987 and March 1988, federal employment tax assessments totalling $14,907 were made against Rabin. Gov't C.A. Br. 3. Those federal tax assessments arose from Rabin's status as a general partner of a partnership known as Marco Polo 1. Pet. App. 2a. Although Rabin and respondent were married at that time, the taxes were owed by Rabin separately and not by respondent. *Id.* at 8a-9a.

A federal tax lien securing the taxes and interest owed by Rabin arose "at the time the assessment [was] made" (26 U.S.C. 6322). This lien reached "all property and rights to property, whether real or personal, belonging to" him at that time. 26 U.S.C. 6321. Pursuant to 26 U.S.C. 6323(a) (1988 & Supp. V 1993), however, this lien in Rabin's property was not valid "as against any purchaser, holder of a security interest, mechanic's

lienor, or judgment lien creditor until notice [of the lien was] filed by the Secretary." *Ibid.*

After the assessments were made, and before notice of the resulting tax lien was filed in the local property records, Rabin transferred his joint interest in the real estate to respondent.[1] On October 25, 1988, he recorded a

[1] After the assessments were made, but before notice of the resulting lien was filed, Rabin and respondent executed an agreement under which Rabin transferred his interest in the property to respondent and respondent agreed to assume three liabilities for which respondent or the property, or both, were already liable (J.A. 7-8, 13-14):

(i) a trust deed in favor of the Home Savings of America securing a loan with an unpaid balance of approximately $113,300 (taxpayer and respondent had jointly signed the deed);

(ii) a trust deed in favor of the First Charter Bank securing a loan with an unpaid balance totalling approximately $325,000 (taxpayer and respondent had jointly signed the loan agreement); and

(iii) an existing judgment lien on the property in favor of the Federal Deposit Insurance Corporation.

Rabin agreed to indemnify respondent with respect to any other liens on the property and (subject to reimbursement by respondent upon the sale of the property) to continue to pay all installment loan obligations, homeowners insurance premiums, property tax assessments, and repair, maintenance and cleaning charges in connection with the property. J.A. 8, 14.

Respondent would have taken Rabin's interest in the property free of the unfiled tax lien only if she qualified as a "purchaser" of the property under 26 U.S.C. 6323(a). A "purchaser" is defined by the statute as a person who provides "adequate and full consideration" for the transfer. 26 U.S.C. 6323(h)(6). Respondent's purported assumption of existing liabilities to which she and the property were already subject did not represent an "adequate and full consideration" for the transfer and therefore did not qualify respondent as a "purchaser" under this statute. See, *e.g.*, *United States* v. *Phillips*, 715 F. Supp. 81, 84 (S.D.N.Y. 1989) (citing cases). The "nominee" lien ultimately filed by the United States against respondent reflects this fact. See Pet. App. 8a.

quitclaim deed to the property naming respondent as the title holder. Pet. App. 8a. Record title therefore vested exclusively in respondent as of that date.

Sixteen days later, on November 10, 1988, the Internal Revenue Service recorded notice of the federal tax lien arising from Rabin's employment tax obligation. Pet. App. 2a. At various times between November 28, 1988, and March 27, 1989, the IRS made additional assessments for unpaid employment tax liabilities against Rabin in sums totalling $26,487. Notices of federal tax lien with regard to those amounts were filed on June 22, 1989, and July 24, 1989. J.A. 9, 15.

On January 19, 1989, respondent commenced proceedings to dissolve her marriage to Rabin. The decree of divorce was granted on March 19, 1990. Pet. App. 7a n.1.

2. On May 9, 1989, while the divorce petition was pending, respondent entered into an escrow agreement to sell the property. On June 26, 1989, the IRS filed notice of a federal tax lien in respondent's name as nominee, alter ego and holder of a beneficial interest in the property for Rabin. Pet. App. 8a. See note 1, *supra*. Respondent asserts that, after receiving notice of this lien, she authorized disbursement of funds from the closing proceeds to pay the tax lien in order to permit the sale to close and to avoid a lawsuit by the purchasers of the property. Pet. App. 8a.

On July 3, 1989, the tax claims of the United States, along with the claims of several other creditors, were paid through the sale escrow. Rabin's outstanding federal tax liability of $41,369 was paid in this manner.

Pet. App. 2a, 8a. At the time of this disbursement, respondent's marriage to Rabin had not been dissolved.

3. Respondent thereafter filed an administrative claim for refund of the amount paid to the United States at her direction. Her refund claim was denied. Pet. App. 2a. On September 30, 1991, respondent commenced this action in federal district court seeking a refund of the $41,369 paid to the United States, plus interest, costs, and attorney's fees, under 28 U.S.C. 1346(a)(1). That statute provides jurisdiction in federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The United States moved for summary judgment, contending that 28 U.S.C. 1346(a)(1) does not provide subject matter jurisdiction for respondent's tax refund claim. Pet. App. 2a-3a.

The district court granted summary judgment to the United States. Pet. App. 7a-18a. The court concluded that a federal tax refund suit may not be brought under 28 U.S.C. 1346(a)(1) by any party other than the taxpayer who is liable for the taxes at issue. The court noted that "[t]he Supreme Court has twice in recent months reaffirmed a restrictive approach to waiver of sovereign immunity" and that "a majority of the Circuits which have addressed [the issue before the court] have held that a narrow construction of section 1346(a)(1) is appropriate and limits standing to sue under the statute to the

taxpayer against whom the tax was assessed." Pet. App. 9a-10a, 11a. The court rejected, as erroneous, the contrary holding of the Fourth Circuit in *Martin* v. *United States*, 895 F.2d 992 (1990), that a person who pays taxes owed by a third party may bring a refund action under 28 U.S.C. 1346(a)(1). Pet. App. 16a-17a.

4. On appeal, the Ninth Circuit reversed. Pet. App. 1a-6a. Following the reasoning of the Fourth Circuit's decision in *Martin* v. *United States*, *supra*, the court of appeals held that 28 U.S.C. 1346(a)(1) "clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes" (Pet. App. 4a, quoting 895 F.2d at 994). In so ruling, the court of appeals expressly disagreed with the contrary holdings of the Fifth and Seventh Circuits in *Snodgrass* v. *United States*, 834 F.2d 537 (5th Cir. 1987), and *Busse* v. *United States*, 542 F.2d 421 (7th Cir. 1976). The court of appeals stated that the latter opinions "fail to give sufficient attention to the plain language of section 1346(a)(1)." Pet. App. 6a. The court further explained that its decision to follow *Martin* was supported by earlier decisions of the Ninth Circuit which, though decided under different statutory provisons, had allowed third parties to sue for refunds of taxes they had paid but did not owe. Pet. App. 5a, citing *United States* v. *Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958), and *Parsons* v. *Anglim*, 143 F.2d 534 (9th Cir. 1944).

SUMMARY OF ARGUMENT

Under 28 U.S.C. 1346(a)(1), federal district courts have jurisdiction over "[a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected." The jurisdiction described by that provision is, however, expressly limited by 26 U.S.C. 7422(a), which provides, in *haec verba*, that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of [the] law in that regard." 26 U.S.C. 6511(a), in turn, provides that any "[c]laim for credit or refund of an overpayment of any tax * * * shall be filed by the taxpayer." The term "taxpayer" is defined as "any person subject to any internal revenue tax." 26 U.S.C. 7701(a)(14).

Reading these provisions as a whole, only a "taxpayer" who has filed a timely claim for refund is authorized to maintain a suit for refund in any court for the erroneous collection of the tax or for any other sum wrongfully collected under the internal revenue laws. Prior to the recent decisions in this case and in *Martin* v. *United States*, *supra*, the courts of appeals had consistently held over several decades that the jurisdiction described in 28 U.S.C. 1346(a)(1) exists only for suits brought by a "taxpayer" and not for suits brought by a third party who paid taxes she did not owe. Congress has provided specific remedies *other than* a tax refund suit for persons whose property becomes subject to liens arising from the tax obligations of third parties. The decisions in this case and in *Martin* erred by focussing on only one part of the elaborate, interlocking scheme that Congress enacted.

ARGUMENT

28 U.S.C. 1346(a)(1) DOES NOT CONFER JURISDICTION OF A SUIT BROUGHT TO RECOVER AMOUNTS PAID BY RESPONDENT TO THE INTERNAL REVENUE SERVICE TO OBTAIN THE RELEASE OF A FEDERAL TAX LIEN ON HER PROPERTY WHEN THE LIEN AROSE OUT OF THE TAX LIABILITIES OF A THIRD PERSON

1. Respondent seeks a refund of taxes she paid that were owed by her husband. Her tax refund claim does not fall within the jurisdiction afforded by 28 U.S.C. 1346(a)(1). That provision establishes jurisdiction in the federal district courts over (*ibid.*):

> [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The jurisdiction conferred by that provision, however, is expressly limited by 26 U.S.C. 7422(a), which provides, in *haec verba*, that (*ibid.*; emphasis added):

> *[n]o suit or proceeding shall be maintained in any court* for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.*

In turn, 26 U.S.C. 6511(a) provides that such a claim for refund or credit must be filed, within specified time limits, "by the taxpayer" (*ibid.*). The term "taxpayer" is defined in the Internal Revenue Code to mean "any person subject to any internal revenue tax." 26 U.S.C. 7701(a)(14).

Reading these provisions as a whole, only a "taxpayer" (under 26 U.S.C. 7701(a)(14)) who has filed a timely claim for refund (under 26 U.S.C. 6511(a)) is authorized to maintain a suit for refund in any court (26 U.S.C. 7422(a)) for the erroneous collection of the tax or for any other sum wrongfully collected under the internal revenue laws (28 U.S.C. 1346(a)(1)). As this Court noted in *United States* v. *Dalm*, 494 U.S. 596 (1990), "[b]y its express language, [26 U.S.C. 7422(a)] conditions a district court's authority to hear a refund suit, regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected, upon the filing of a claim for refund." 494 U.S. at 609 n.6. Since only the "taxpayer" may assert a "claim for refund" (26 U.S.C. 6511(a)), only a "taxpayer" who has done so may bring a suit for refund under 28 U.S.C. 1346(a)(1).[2]

[2] In the course of a lengthy, historical review of the antecedents of the tax refund procedures existing at the time of the decision on rehearing in *Flora* v. *United States*, 362 U.S. 145 (1960), this Court noted that 26 U.S.C. 7422(a), by its terms, creates no jurisdiction and is thus not itself "a jurisdictional statute at all" (362 U.S. at 152). By limiting the circumstances in which a suit of the type specified under 28 U.S.C. 1346(a)(1) may "be maintained in any court" (26 U.S.C. 7422(a)), however, the statute limits the scope of the jurisdiction afforded under the other provision. The language of the two statutes, which is *in haec verba*, must be read together to determine which suits may be maintained within the jurisdiction of the federal district courts. See *United States* v. *Dalm*, 494 U.S. at 609 n.6.

As several of the courts of appeals have concluded (see, *e.g.*, *Snodgrass* v. *United States*, 834 F.2d 537, 540 (5th Cir. 1987); *Phillips* v. *United States*, 346 F.2d 999, 1000 (2d Cir. 1965); Pet. App. 10a-11a), this understanding of the statutory scheme—which reflects the natural meaning of the language of these provisions—is reinforced by the established rule that "any waiver of the National Government's sovereign immunity must be unequivocal" and that such waivers are not to be "enlarge[d] * * * beyond what the language requires" (*United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992), quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)).[3] See also *United States* v. *Dalm*, 494 U.S. at 608. "Faced with what is at best an absence of any evidence as to an intent to waive sovereign immunity with respect to suits by non-taxpayers, we think that § 1346(a)(1) should be inter-preted as not extending to such suits." *Phillips* v. *United States*, 346 F.2d at 1000 (Lumbard, C. J.).

The Second, Third, Fifth, Seventh and Tenth Circuits have thus correctly concluded that the jurisdiction

[3] In *Flora* v. *United States*, the Court concluded that 28 U.S.C. 1346(a)(1) "requires full payment of the assessment" before a refund suit may be maintained in district court. 362 U.S. at 177. As the Court explained in *United States* v. *Dalm*, Section 6511(a) authorizes a claim for refund only when an "overpayment" has occurred and "[t]he commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed" (494 U.S. at 609 n.6). In situations where the Internal Revenue Code permits suit to be brought by non-taxpayers (see pages 17-19, *infra*), however, Congress has specified that the underlying tax assessments "shall be conclusively presumed to be valid." 26 U.S.C. 7426(c). Respondent's contention that non-taxpayers should be permitted to bring suits challenging the validity of the underlying tax would render the specific limitation imposed by Congress in 26 U.S.C. 7426(c) wholly nugatory.

described in 28 U.S.C. 1346(a)(1) exists only for suits brought by a "taxpayer." *Pershing Division of Donaldson, Lufkin & Jenrette Securities Corp.* v. *United States*, 22 F.3d 741, 743 (7th Cir. 1994); *Snodgrass* v. *United States*, 834 F.2d at 539; *Busse* v. *United States*, 542 F.2d 421, 425 (7th Cir. 1976); *Lac Courte Oreilles Chippewa Indians* v. *United States IRS*, 845 F.2d 139, 142 (7th Cir. 1988); *Hofheinz* v. *United States*, 511 F.2d 661, 662 (5th Cir. 1975); *Eighth Street Baptist Church, Inc.* v. *United States*, 431 F.2d 1193, 1194 (10th Cir. 1970); *Phillips* v. *United States*, 346 F.2d at 1000; *First Nat'l Bank* v. *United States*, 265 F.2d 297, 299-300 (3d Cir. 1959). See also *Luce* v. *United States*, 444 F. Supp. 347, 348 & n.1 (W.D. Mo. 1977); *Bailey* v. *United States*, 104 F. Supp. 997, 1000-1001 (Ct. Cl. 1952); *Naus* v. *Brodrick*, 103 F. Supp. 233, 234-237 (D. Kan. 1951). As these courts have uniformly held, 28 U.S.C. 1346(a)(1) affords jurisdiction for the recovery of "taxes which the taxpayer has wrongfully been required to pay." *Snodgrass* v. *United States*, 834 F.2d at 539. The jurisdiction afforded by that statute "is not available where the plaintiff does not bring suit as a taxpayer" (*Phillips* v. *United States*, 346 F.2d at 1000).

By contrast, the Ninth Circuit in this case (Pet. App. 4a-6a) and the Fourth Circuit in *Martin* v. *United States*, 895 F.2d at 994, incorrectly viewed 28 U.S.C. 1346(a)(1) in isolation.[4] In particular, these courts failed

[4] The Ninth Circuit stated (Pet. App. 5a) that its decision in this case is "consistent" with its earlier decisions in *Parsons* v. *Anglim*, *supra*, and *United States* v. *Halton Tractor Co.*, *supra*. Neither of those decisions, however, addresses the jurisdictional scope of 28 U.S.C. 1346(a)(1).

In *Parsons*, the court allowed a tax refund suit to proceed when the person who paid the tax had been treated by the Commissioner "as a transferee who [owed] the tax" and was directly and personally liable for it. 143 F.2d at 536. In the present case, unlike

to consider the express limitations established in 26 U.S.C. 7422(a) on the jurisdiction provided by 28 U.S.C. 1346(a)(1). By failing to consider the plain language of *all* of the applicable statutes, the Fourth and Ninth Circuits reached an incorrect understanding of the statutory scheme.[5]

in *Parsons*, respondent was not claimed to be "subject to" the tax and therefore was not a "taxpayer" (26 U.S.C. 7701(a)(14)) who could bring suit for a refund under 28 U.S.C. 1346(a)(1). See, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d 408, 411 (6th Cir. 1934), cert. denied, 294 U.S. 712 (1935).

In *Halton Tractor Co.*, the government did not raise a jurisdictional objection to the non-taxpayer's suit for recovery of taxes paid to remove a lien on property. Instead, the government contended that the suit should not be permitted because the payment had been made voluntarily, rather than under duress. See 258 F.2d at 615. The court rejected that contention, noting that the statute had been amended to provide that suit "may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress." *Id.* at 616, quoting (what is now) 26 U.S.C. 7422(b).

[5] Of the several circuit court decisions addressing this issue, only the Fifth Circuit (*Snodgrass* v. *United States*, 834 F.2d at 539) has cited this Court's decision in *Stahmann* v. *Vidal*, 305 U.S. 61 (1938). In *Stahmann*, the Court held that a cotton producer who paid a federal "cotton ginning" tax could bring a refund action for the allegedly unconstitutional tax. Although the ginning tax was imposed directly on cotton ginners, the Court concluded that the producers could bring refund suits in their own names because the tax "was intended to fall, and the [Bankhead Cotton] Act attempted to make it fall, upon the producers." *Id.* at 65. Concluding that the tax was, in substance, imposed on the producers, the Court noted that the unique "scheme of the [Bankhead Cotton] Act sets the case apart from any to which our attention has been called arising under other taxing acts." *Ibid.*

Having resolved the case on this basis, the Court added, in dicta, that "[w]hether or not the tax was imposed upon the [producers], they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because

In this case, it is undisputed that respondent is not the "taxpayer." Pet. App. 2a, 8a. It is Rabin, not respondent, who was "subject to" (26 U.S.C. 7701(a)(14)) the federal employment tax. Rabin did not file an administrative refund claim under 26 U.S.C. 6511(a) and did not commence this tax refund suit under 28 U.S.C.

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they paid the tax under duress of goods [to remove the ginning tax lien]." 305 U.S. at 66. The "accepted principles" described in *Stahmann* apparently related to a common law restriction on tax refund suits. Prior to 1924, a taxpayer could not bring a refund suit to recover taxes for which he was personally liable *unless* the taxes had been paid under protest or duress. See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 375-377 (1933). In 1924, however, Congress added what is now 26 U.S.C. 7422(b) to the Internal Revenue Code, expressly to permit a taxpayer to bring a refund suit "whether or not such tax, penalty, or sum has been paid under protest or duress" (*ibid.*). See *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. at 375-377. The only appellate decisions cited by the Court in *Stahmann* (305 U.S. at 64 n.6) related to a different point: they drew a distinction between (i) plaintiffs who paid assessments which they believed (correctly or not) had been made against them, who were permitted to bring a refund suit as the "taxpayer," and (ii) plaintiffs who "knowingly" (and in this sense "voluntarily") paid taxes *owed by a third party*, who were *not* allowed to bring a refund suit. See *ibid.*, citing, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d at 411 (the statute "gives no aid to one who 'pays another's tax actually due, with full knowledge of what he is doing'"); *Clift & Goodrich, Inc.* v. *United States*, 56 F.2d 751, 753 (2d Cir. 1932); *Wourdack* v. *Becker*, 55 F.2d 840, 842 (8th Cir.), cert. denied, 286 U.S. 548 (1932).

Since 1938, this Court has cited its decision in *Stahmann* v. *Vidal* only once. In *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940), the Court cited *Stahmann* for the proposition that "[t]he taxpayer is the person ultimately liable for the tax itself." *Id.* at 52. See also 26 U.S.C. 7701(a)(14) (defining the term "taxpayer" to mean "any person subject to any internal revenue tax"). In the present case, it is undisputed that it is Rabin, not respondent, who "is the person ultimately liable for the tax itself" (*Colorado Nat'l Bank* v. *Bedford*, 310 U.S. at 52).

1346(a)(1).[6] The district court therefore correctly concluded (Pet. App. 9a-18a) that it lacked jurisdiction over the refund suit commenced by respondent, who was not the "taxpayer."

2. This is not to say that respondent lacked any effective means to challenge the liens against her interest in the property. Congress has provided non-taxpayers with remedies *other than* a tax refund suit. In particular, a person (such as respondent) who believes that a tax lien arising from the obligations of someone else has improperly been imposed on her property may commence an action to "quiet title" to that property under 28 U.S.C. 2410(a)(1). The procedural validity of the federal tax lien, but not the validity of the underlying assessment, may be adjudicated in that action. See, *e.g.*, *Huff* v. *United States*, 10 F.3d 1440, 1445 (9th Cir. 1993), cert. denied, 114 S. Ct. 2706 (1994); *Johnson* v. *United States*, 990 F.2d 41, 43 (2d Cir. 1993); *James* v. *United States*, 970 F.2d 750, 753 (10th Cir. 1992); *Aqua Bar & Lounge, Inc.* v. *United States*, 539 F.2d 935, 939 (3d Cir. 1976).

If the statutory quiet title procedure would be inadequate to permit a desired, prompt sale of the property, a person in respondent's position would be able to obtain an immediate certificate of discharge of the federal tax lien by agreeing with the Secretary to hold the proceeds of such a sale "as a fund subject to the liens and claims of the United States, in the same manner and

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[6] The fact that a non-taxpayer, such as respondent, files an administrative refund claim does not convert her into the "taxpayer" to satisfy this jurisdictional requirement. See *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 590 (Ct. Cl. 1972); *Ray* v. *United States*, 453 F.2d 754, 758 (Ct. Cl. 1972). The "taxpayer" is the person who is "subject to" the tax. 26 U.S.C. 7701(a)(14).

with the same priority as such liens and claims had with respect to the discharged property" (26 U.S.C. 6325(b)(3)). The respective rights of the non-taxpayer and the United States in such a fund (and, in particular, the validity of the federal tax lien on the property) are then to be determined in a suit brought in federal district court under 26 U.S.C. 7426(a)(3). If the non-taxpayer prevails in that suit, she is to be given "judgment in an amount equal to all or any part of the amount of such fund." 26 U.S.C. 7426(b)(4).

Non-taxpayers may also obtain an adjudication of their rights to, and the priority of their claims against, such property in any foreclosure action brought by the United States under 26 U.S.C. 7403. See 26 U.S.C. 7403(c). The Internal Revenue Code also provides a comprehensive set of remedies for any non-taxpayer who asserts that the United States has wrongfully levied on her property to collect taxes. These remedies are set forth in 26 U.S.C. 7426, which is entitled "Civil Actions By Persons Other Than Taxpayers." With respect to suits brought by non-taxpayers to challenge tax levies, however, Congress expressly provided that the underlying tax assessments "shall be conclusively presumed to be valid" (26 U.S.C. 7426(c)).[7] See note 3, *supra*.

These carefully defined and limited remedies for non-taxpayers under Title 26 would be made largely superfluous under the interpretation of 28 U.S.C. 1346(a)(1) adopted by the court of appeals in this case. In enacting 28 U.S.C. 7426 in 1966, however, Congress had a

[7] In the present case, respondent paid the amount of the outstanding tax lien on her property without any foreclosure or levy by the United States. The remedies provided to her by statute were either to challenge the lien in a quiet title suit (under 28 U.S.C. 2410) or to agree to hold the sale proceeds in a fund for adjudication and distribution under 26 U.S.C. 7426(a)(3) and (b)(4).

quite different view. The legislative history of this statute correctly reflects that, prior to its enactment, "the United States [could] not be sued by third persons where its collection activities interfere with their property rights." S. Rep. No. 1708, 89th Cong., 2d Sess. 29 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 27 (1966). Congress noted that, before 26 U.S.C. 7426 was enacted in 1966, although a "taxpayer can bring a refund action against the Government," "a third person" whose property was subjected to a levy for payment of another's taxes was "without a remedy against the Government." S. Rep. No. 1708, *supra*, at 29; H.R. Rep. No. 1884, *supra*, at 27. As the Fifth Circuit noted in *Snodgrass* v. *United States*, 834 F.2d at 539, in concluding that 28 U.S.C. 1346(a)(1) does not afford jurisdiction for refund suits by non-taxpayers, "[t]he legislative history of this section, 26 U.S.C. § 7426, indicates Congress's intent that it, rather than an expansively-interpreted § 1346(a)(1), serve as the remedy for third parties harmed by tax levies * * * [and] that this 'wrongful levy' provision is now the only means by which third parties may challenge the tax-collection activities of the IRS." See also *Busse* v. *United States*, 542 F.2d at 425.

Congress has long been aware of the many decisions that have concluded that 28 U.S.C. 1346(a)(1) does *not* provide jurisdiction over tax refund suits brought by non-taxpayers against the United States. In enacting specific statutory remedies for non-taxpayers in 1966, "Congress acted—as it is presumed to act * * *—with full awareness of the well-established judicial interpretation" of this jurisdictional statute (*Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987)). Instead of altering that established interpretation, Congress confirmed it by electing to provide narrow and appropriately tailored remedies for non-taxpayers. See S. Rep. No. 1708, *supra*, at 29 ("[t]hese are all actions in

which the taxpayer's tax liability is not open to question."); H.R. Rep. No. 1884, *supra*, at 28 (same); note 3, *supra*.[8]

3. The interpretation of 28 U.S.C. 1346(a)(1) adopted by the court of appeals departs from decades of decisions that have construed that statute to authorize tax refund suits only when brought by a "taxpayer." The court's interpretation also threatens to provide a haven for delay or evasion of tax liabilities.

a. When a taxpayer's obligation has been paid by a third party, the Treasury would have no basis for pursuing further collection efforts. Since no outstanding tax obligation would remain, there would be no basis for collecting any further tax. Moreover, any outstanding lien on the taxpayer's property would be discharged. See 26 U.S.C. 6325(a)(1) (providing for the release of liens when the tax liability "has been fully satisfied").

b. If a non-taxpayer who had paid the taxpayer's obligation were thereafter permitted to bring a suit for a refund under 28 U.S.C. 1346(a)(1), within the period permitted by the statute of limitations for refund suits,[9] and were to prevail on the theory that the lien on her

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[8] Over the three decades since 26 U.S.C. 7426 was enacted, the statutory scheme for the resolution of disputes concerning the validity and priority of federal tax liens and levies has operated in an efficient and orderly manner except when (as here) a person claiming injury has been unaware of these procedures or has chosen not to invoke them.

[9] 26 U.S.C. 6532(a), entitled "Suits By Taxpayers for Refund," generally provides a two-year statute of limitations for refund suits from the date that notice of disallowance of the refund claim is mailed by the Secretary. By contrast, 26 U.S.C. 6532(c), entitled "Suits By Persons Other Than Taxpayers," generally requires a non-taxpayer to commence suit for wrongful levy under 26 U.S.C. 7426 within nine months of the date the levy occurred.

property had been erroneously imposed, it could then be too late for the United States to pursue further collection actions against the taxpayer. See 26 U.S.C. 6502(a)(1) (Supp. V 1993) (suit for collection to be brought with 10 years of the assessment).[10] Even if the statute of limitations for collection had not expired, the fact that the liens on the taxpayer's property were discharged when the taxes were previously paid (by the non-taxpayer) would obviously hinder further tax collection efforts, for the valid interests of intervening third parties would then take priority over the government's claim. See 26 U.S.C. 6325(f)(2).

c. Under the interpretation adopted by the court of appeals in this case, a taxpayer may thus seek to delay or evade final collection of his tax obligations by the artifice of having the taxes paid by another person, who would then assert a claim that the payment made by her was erroneous. Recognizing the risks and complications that would result from the collateral litigation of "tax refund" actions by non-taxpayers, Congress elected to provide wholly separate remedies for taxpayers and non-taxpayers. The decision in this case erroneously focussed on only one of the applicable provisions and thereby misunderstood the elaborate, interlocking scheme that Congress has enacted.

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[10] By contrast, if a taxpayer pays the tax and thereafter sues for a refund, the refund will not be allowed unless an "overpayment" of tax has occurred. See *United States* v. *Dalm*, 494 U.S. at 609 n.6; note 3, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 94-395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

LORI RABIN WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LORI RABIN WILLIAMS

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I. QUESTION PRESENTED

Whether or not a person may sue the United States pursuant to 28 U.S.C. 1346(a)(1) for a refund of taxes alleged to have been excessive, erroneously or illegally collected, or alleged to have been in any manner wrongfully collected under the internal revenue laws from that person.

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IN THE

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ON WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LORI RABIN WILLIAMS

II. STATEMENT OF THE CASE

Although the question presented is whether 28 U.S.C. 1346(a)(1) allows respondent to sue for a refund of taxes alleged to have been erroneously collected by the IRS in this case, it is essential to a proper resolution of that question to understand the factual background giving rise to respondent's suit for refund of the money

that she alleges was unlawfully taken by the government. The statement of the case presented by the petitioner in its brief on the merits fails to fully describe the sequence of events resulting in this claim for refund.

At the time that the events giving rise to the current claim took place, respondent was married to Jerrold Rabin ("Rabin"). They lived in California and owned real estate in Pacific Palisades ("Alcima House"), which eventually became the subject of the government's claim that its tax liens attached to the property. Rabin, but not respondent, was a partner in a partnership known as Marco Pollo I that owned a restaurant. The original tax liability allegedly arose when the partnership withheld income and social security taxes from its employees, but failed to turn this money over to the government.

The Internal Revenue Code has long included a measure to protect the government in situations such as this, 26 U.S.C. §6672, under which any person, who withholds taxes and fails to pay them over to the Internal Revenue Service, is subject to a penalty in an amount equal to the tax that has not been paid. The provision is commonly known as the 100% penalty provision, and the persons who are obligated to pay such penalties are known as responsible officers. Under section 6671[1], those penalties are treated as taxes for all purposes.

The IRS first claimed that Rabin was a responsible officer for Marco Pollo I with respect to unpaid taxes for the first quarter of 1987. On June 29, 1987, the IRS assessed Rabin and others for those taxes pursuant to

[1] All references in this brief to sections without mention of a specific Title are references to Title 26 of the United States Code Annotated (the Internal Revenue Code), unless otherwise indicated.

section 6672. As a result of sections 6321 and 6322 of the Code, the assessment became an immediate lien on all property belonging to Rabin, which included his interest in Alcima House which he and respondent jointly owned. Subsequently, on March 28, 1988, the IRS assessed Rabin for Marco Pollo's unpaid taxes for the fourth quarter of 1987. The total of these two assessments was $14,907.88.

Although the IRS' liens attached to any property belonging to Rabin pursuant to 6321, the Code provides protection for certain categories of persons who deal with those against whom IRS liens have been filed. Under section 6323(a), innocent purchasers and others who obtain an interest in property subsequent to an assessment take precedence over the claims of the Internal Revenue Service, unless those persons had actual notice of the assessment, or the Service had filed a notice of tax lien under section 6323(f). There is no claim here that respondent had actual notice of the liens until June 1989, and the first date on which the Service filed a notice of tax lien, which covered the two assessments noted above, was November 10, 1988.

However, on October 25, 1988, as part of a division of marital property in contemplation of the divorce which eventually would take place between Rabin and respondent, Rabin transferred to respondent all of his interest in Alcima House, in exchange for her assuming certain liabilities. There is no claim made that respondent had any independent liability for the penalty under section 6672 or otherwise, and the only claim that the Service has ever made against her is that she was in some manner a "nominee" of Rabin, or that the transfer of his interest

in Alcima House was invalid. Both of these assertions were ultimately stipulated to be incorrect.[2]

The Service did not seek to enforce its lien or otherwise collect on the two assessments. Meanwhile, on May 5, 1989, respondent entered into a contract for the sale of Alcima House which, under section 6323(h)(6)(B), constituted a purchase that would take priority over the government's lien unless a prior notice had been filed. The government had filed its notice of November 10, 1988, but that lien was for only $14,907.88, and still was not valid as to respondent who had obtained her husband's interest in the property for adequate consideration prior to the IRS filing the lien. In the meantime, between November 28, 1988 and March 27, 1989, the IRS made additional assessments against Rabin in the amount of $26,461.70, but failed to file any tax liens until June 22, 1989. On June 26, 1989, it gave actual notice to all parties to the purchase and sale of Alcima House that it had more than $41,000 in tax liens which, it claimed, were valid against the property or the proceeds of the sale.

The closing was scheduled to take place on July 3, 1989, and the purchasers threatened to sue respondent if the sale did not go through on schedule. Moreover, since the contract had been entered into while the property

[2]It was established in discovery that Rabin had transferred his interest in Alcima House in exchange for the respondent's paying off a liability to the Federal Deposit Insurance Corporation that was solely Rabin's responsibility. This was later determined in the dissolution proceedings to have been adequate consideration for the transfer. The government stipulated to this fact in the statement of uncontroverted facts filed with the District Court, see J.A. p. 7-8, specifically fact nos. 3, 4, and 4(3) taken in conjunction.

was in foreclosure, it was not simply a matter of postponing the sale of the property until the validity of the IRS's liens could be determined. Under those circumstances, respondent believed that she had no realistic alternative, and none was suggested to her by the IRS, other than to agree that the entire $41,369.58 would be paid under protest to the IRS out of the proceeds of the sale.

Accordingly, at the closing, which took place on July 3, 1989, the IRS received the $41,369.58, and the sale was consummated. The respondent filed with the IRS a timely Formal Claim for Refund of Taxes Paid (the "Administrative Claim for Refund") as required by 26 U.S.C. 7422(a) within the period prescribed by 26 U.S.C. 6511(a), which was denied by the IRS on or about November 17, 1989.

Respondent then filed suit in the United States District Court for the Central District of California under 28 U.S.C. §1346(a)(1), alleging that the amount received by the IRS was erroneously collected from her, and seeking a refund of the amount paid to the IRS from the proceeds of the sale of Alcima House. In her complaint, respondent sought a refund of $41,369.58, plus interest, costs, and reasonable attorney's fees.

Respondent had the following basis for requesting the refund: (1) that the taxes were collected from her; (2) that she was not assessed nor given any notice or demand as to the subject tax liabilities; (3) that the liens were against Marco Pollo I, a partnership and its partners, not against herself; (4) that her husband's interest in the residential real estate and personal dwelling "Alcima House" had been transferred to her for adequate consideration prior to the filing of the subject tax liens, and therefore the liens could not attach to the subject prop-

erty; (5) that she was not a nominee of Marco Pollo I or the partners, or any of them; and, (6) she was alleging that the taxes collected from her to pay off the liability of Marco Pollo I and/or the partners had been collected erroneously under the internal revenue laws.

Both parties moved for summary judgment in the District Court. The government did not defend the validity of its lien on the property from which the proceeds were paid to it, but argued solely that 28 U.S.C. 1346(a)(1) did not provide a waiver of sovereign immunity to sue the government because that provision was available only to "taxpayers," and respondent was not a taxpayer. Respondent cross-moved for summary judgment, based on the stipulated facts in the record, arguing principally that the government's liens were entirely invalid because the October 25, 1988 transfer of Rabin's interest in Alcima House to respondent had occurred prior to any notice of lien being filed under section 6323(f), and that Alcima House had been conveyed to respondent in exchange for valuable consideration from Rabin.[3]

The District Court recharacterized the case as a trial on stipulated facts. The sole issue to be decided was sub-

[3]Respondent made an additional argument as to a portion of the total amount of the payment, based on the fact that, as of December 31, 1987, Rabin had fully disengaged himself from the partnership under the laws of California, and thus, as a matter of law, could no longer be held to be a responsible officer under section 6672. Since respondent's principal claim that she did not owe the tax and that the government's liens were invalid on her property would entitle her to a full recovery, the issue as to the legal effect of Rabin's disengagement from the partnership need only have been reached in the event that the government's lien claim had prevailed and it would then have been necessary to determine if the underlying taxes against Rabin were assessed erroneously.

ject matter jurisdiction, whether or not respondent was permitted to bring a refund action in District Court (see Joint Appendix p. 24).[4] The District Court agreed with the petitioner that 28 U.S.C. 1346(a)(1) did not permit a waiver of sovereign immunity to sue the government.

The Court of Appeals reversed and remanded the case for a decision on the merits. It rejected the petitioner's argument that there was no subject matter jurisdiction finding that section 1346(a)(1) was not limited to taxpayers, as the petitioner had urged. The Ninth Circuit held that the plain meaning of the statute provided jurisdiction to a person subject to an erroneous collection action to sue the government, and in this case the respondent had alleged that she had been subject to an erroneous collection action. Therefore she should be permitted to proceed on the merits of her claim.

III. SUMMARY OF ARGUMENT

Respondent begins with the assumption that Congress intended that, when the Internal Revenue Service obtained money to which it was not entitled, the rightful owner should be able to sue in some forum to recover that money. The statute that Congress enacted to achieve that purpose was 28 U.S.C. 1346(a)(1), which clearly states that jurisdiction exists upon an allegation of an erroneous assessment or collection. The IRS contends to the contrary. The position espoused by petitioner, namely whether or not the IRS is entitled to the taxes, once they have been collected, even under duress

[4]The Joint Appendix will hereafter be abbreviated J.A.

of an imposition of a lien during foreclosure of property about to be sold, Congress intended that persons such as respondent cannot sue for refunds unless the person is a "taxpayer" as that term is narrowly construed by the petitioner. According to the petitioner, there is no way to avoid the "unfortunate harshness of a ruling which places the [respondent] in the anomalous position of having no remedy to redress its alleged grievance." *Lac Courte Oreilles Chippewa Indians v. United States,* 845 F.2d 139, 140 (7th Cir. 1988).

The petitioner attempts to avoid taking the position that persons in situations like this have *no* remedy at all, by pointing to three other provisions that provide theoretical remedies to persons who claim that their property has been subjected to unlawful interference by the IRS. But one of those statutes, section 7426, applies only to a wrongful levy, and it is agreed that no levy occurred here. The second – an action to quiet title under 28 U.S.C. 2410 – applies only before the lien has been satisfied, and could never have been brought, let alone decided, in the narrow window available to respondent here before the sale of her property was scheduled to take place. The final IRS suggestion – substituting the proceeds of the sale for the property on which there is a lien pursuant to section 6325(b)(3) – is not available once the lien has been satisfied and, more significantly, is not a right, but is an "alternative" entirely within the discretion of the government, which it never suggested to respondent.

Despite making the argument that respondent had numerous alternatives as indicated above, the petitioner then proceeds to make its main argument one of "statutory integration," that the entirety of the Internal Revenue Code was intended by Congress to fit together

like a well constructed puzzle, with each logical piece following the other in harmony, or in what they refer to as an "elaborate, interlocking scheme that Congress has enacted." (Pet. Brf. p. 21c.).[5]

IV. ARGUMENT

A.
THE PLAIN MEANING OF THE STATUTE AUTHORIZES JURISDICTION.

28 U.S.C. 1346(a)(1) is the federal statute that conveys subject matter jurisdiction in the United States District Court by authorizing the waiver of sovereign immunity for specific matters. 28 U.S.C. 1346(a)(1) in pertinent part states as follows:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> (1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been *erroneously or illegally assessed or collected,* or any penalty claimed

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[5]To anyone who has had the pleasure of working extensively with the Internal Revenue Code, it is doubtful that "an elaborate, interlocking scheme" will be found therein. Each successive Congress has enacted additional legislation that amends, deletes and restructures the Code in what more appropriately might be called a "haphazard fashion". A good example of this type of behavior was the tremendous revision of the Code in 1986, wherein capital gains was abolished. Yet, the provisions of the Code that provided for capital gains treatment were not removed at all, rather just the capital gains rate was deleted. Therefore, if the Code were to be followed verbatim, capital gains would still have to be segregated and reported separately, only to be taxed at ordinary income tax rates. The government in their brief in essence admits this, for while arguing that the statutory structure worked in an elaborate interlocking scheme also argues out of the other side of their mouth that the Code provided respondent with various alternative remedies for her predicament.

> to have been collected without authority or any sum alleged to have been excessive or *in any manner wrongfully collected under the internal revenue laws;* . . . (emphasis added).

As emphasized in the quotation above, the statute allows a waiver of sovereign immunity in those cases where an internal revenue tax has been alleged to have been erroneously or illegally assessed or collected. The statute does not in any part or in any manner restrict its grant of jurisdictional authority to a "taxpayer" nor is that term mentioned or defined. The focus of the statute is solely on the allegation that taxes, penalties or other sums *have been erroneously or illegally assessed or collected or in any manner wrongfully collected under the internal revenue laws.* It is the act of being subjected to an erroneous or wrongful collection that conveys an unequivocal expression of a waiver of sovereign immunity upon the person subject to such an erroneous or wrongful collection.

Obviously in arguing that section 1346(a)(1) does not permit a refund suit by respondent, the petitioner ignores the language "any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." Both the Ninth Circuit in this case and the Fourth Circuit have held that the petitioner's argument in this vein is not consistent with the plain language of the statute. This plain reading of the language of the statute was endorsed by the United States Court of Appeals for the Fourth Circuit on almost identical facts. In their decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990) the Fourth Circuit Court was confronted with a situation where the United States had erroneously collected tax from the ex-wife of the taxpayer.

The Fourth Circuit in *Mona Martin* did not agree with the petitioner's interpretation. The Court in a concise and well-drafted opinion reached the following conclusion:

> Although appellants argue for a broad reading of the statute and the IRS argues for a narrow interpretation, we think the result of this case requires neither, but lies instead in a plain reading of the statute which gives the district courts jurisdiction over civil actions brought against the government to recover any tax "alleged to have been erroneously or illegally assessed or collected . . . ." (Emphasis added.) Although the statute is silent as to who can bring the action, implicit in its language is that one against whom the tax was erroneously assessed or collected has standing to do so . . . Thus, there is no question in this case but that the taxes paid by the appellants were erroneously collected. The statute clearly allows one from whom taxes are erroneously or wrongfully collected to sue for a refund of those taxes. The taxes in this case were erroneously collected from the appellants because they did not owe them. The district court erred in finding that the statute does not allow the appellants to sue for a refund.

The law in the Fourth Circuit and the Ninth Circuit is now clear, that a person from whom the IRS erroneously collected tax may sue the United States for a refund pursuant to 28 U.S.C. 1346(a)(1). The Ninth Circuit in this case held that it would follow the better reasoned analysis in the *Mona Martin* decision rendered in the Fourth Circuit and rejected the holdings of the Seventh Circuit in *Busse u United States,* 542 F.2d 421 (7th Cir. 1976) and the Fifth Circuit in *Snodgrass v. United States,* 834 F.2d 537 (5th Cir. 1987).

In order to deny jurisdiction to the respondent, the petitioner reads language into the statute that is not there, namely the term "taxpayer", and then argues that the statute is limited to only "taxpayers" who have been "assessed" the tax (who "owe" the tax in question). The statute is not so limited, and the petitioner's adding additional language to the statute in order to deny jurisdiction in this case is analogous to the argument made by the plaintiff in *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992), who attempted to enlarge the language of the Bankruptcy Code Title 11 U.S.C. 106(c) to obtain a waiver of sovereign immunity. This Court held that the "statute should not be enlarge[d] . . . beyond what the language requires" quoting from *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)).

The definition of who is a "taxpayer" according to the petitioner "is the person against whom the tax was assessed." The interesting dichotomy this presents is that the petitioner's interpretation renders the plain language of the statute superfluous. In other words, if the petitioner's position in this matter is correct, the language of 28 U.S.C. 1346(a)(1) authorizing jurisdiction in this case of an erroneous assessment *or* an erroneous collection would have no meaning because there would always have to be an assessment against a "taxpayer" (according to the petitioner's definition of "taxpayer") and the words "or collected" would be rendered irrelevant. The petitioner's reading of section 1346(a)(1) ignores the first rule of statutory interpretation, which is not to render any word in the statute meaningless. This violates the settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect. *United States v. Menasche*, 348 U.S. 528, 538-

539 (1955), and *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989).

If only "taxpayers" as petitioner defines that word were allowed to sue the government under 1346(a)(1), then by definition they would have been determined to owe the taxes and have been assessed by the IRS. The disjunctive clause of the statute, providing that any internal revenue tax alleged to have been erroneously assessed *or* collected would be unnecessary, a "taxpayer" need only allege that the tax was erroneously assessed as to him. Any further allegation a tax was erroneously collected would provide no additional grant of jurisdiction. The only interpretation of section 1346(a)(1) that gives independent meaning to the language "or erroneously collected" would be an interpretation that provides **two alternative grounds for jurisdiction**, when taxes are erroneously assessed *or* when taxes are erroneously collected. That is the way the statute is worded, that is the way the statute reads.[6]

In order for the additional language in the statute to have independent meaning, there must be a situation

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[6]There is one possible situation where a proper assessment could nevertheless lead to an improper collection as to a "taxpayer," as the petitioner defines that term. If the IRS were to assess taxes against responsible officers of a corporation for the failure of the corporation to remit its payroll tax obligations, and then proceeded to collect the same sums from multiple officers, the IRS in effect would be "overpaid." In such a remote situation, a "taxpayer" would in fact be subject to an erroneous collection without having been erroneously assessed. However, it is a stretch to say Congress only intended the language in the statute to cover this remote situation when it drafted the language "or erroneously collected," and in fact it is doubtful the IRS (hopefully) would actually require such a taxpayer to go to District Court. The actual remedy for such a situation is an administrative request for an abatement of the taxes filed with the Service.

where a person is subject to an erroneous collection but was not assessed the taxes. When taxes are "in any manner wrongfully collected," subject matter jurisdiction is granted to the person from whom the taxes were erroneously collected. This is implicit in the statute. In this case, respondent was not the subject of an erroneous assessment, but was the subject of an erroneous collection action taken by the IRS.

The method used by the petitioner to read its definition of "taxpayer" into 28 U.S.C. 1346(a)(1) is a convoluted trail of logic they call the "elaborate, interlocking scheme" that Congress has enacted in the Internal Revenue Code. Its argument, or so it goes, starts with Internal Revenue Code section 7701(a)(14), the definition of "taxpayer". The term taxpayer is defined there as "any person subject to any internal revenue tax". The petitioner then proceeds to argue that prior to bringing an action in District Court under 28 U.S.C. 1346(a)(1), an Administrative Claim for Refund must be filed with the Secretary pursuant to section 7422(a), and that said claim must be filed by the "taxpayer" within two years from the date the tax was paid pursuant to section 6511(a).

The petitioner's argument fails for the following reasons: (1) the definition they cite to is in the IRC (Title 26) and is therefore not authority for, nor relevant to, the determination of jurisdiction for the purposes of Title 28, where the jurisdictional statute 1346(a)(1) is located; (2) the petitioner ignores the preamble to 7701(a)(14) located in definitional section 7701(a), limiting the definitions that follow "when used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof"; (3) the word "taxpayer" as used in section 6511(a) has been held

to mean the word in its generic sense only, not a term of art as petitioner maintains (see court decisions below); and (4) the generic word "taxpayer" is defined as a person that pays taxes[7]. The respondent did in fact "pay" the taxes in this case.

The petitioner attempts to redefine the word "taxpaper" as a term of art to mean the "person that owed the tax" as opposed to the person that paid the tax. This definition then forms the core of petitioner's argument that the use of the word "taxpayer" in section 6511(a) requires only a taxpayer to file the Administrative Claim for Refund, which is a prerequisite to jurisdiction to sue in United States District Court. In this indirect way, the petitioner reads a term of art "taxpayers" into 28 U.S.C. 1346(a)(1) to limit who can sue under that section.

Therefore, under the petitioner's interpretation, only Marco Pollo I or its partners would be permitted to sue for refund pursuant to section 1346(a)(1), and only based on an erroneous assessment, since under the petitioner's definition only the person who "owed" the tax can sue. However, the statute does not provide that "taxpayers" can sue the government for a refund in the situation of an erroneous collection by the IRS. Petitioner's interpretation renders the statute completely unavailable to any plaintiff.

Two recent Federal decisions have rebuffed the petitioner's identical argument advanced in this case, and both disagreed with the petitioner's novel interpretation of the interlocking relationship of the three statutes.

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[7]The American Heritage Dictionary of the English Lanauge defines "taxpayer" as "a person who pays taxes."

In *Brodey v. United States,* 788 F. Supp. 44 (D. Mass., 1991), the court specifically discussed the word "taxpayer" as a term of art. The court concluded that first, section 1346(a)(1) provided jurisdiction to a person against whom the tax has been erroneously collected. In determining this threshold issue, the court looked to the plain language of the statute and the decision in *Mona Martin v. United States,* 895 F.2d 992 (4th Cir. 1990).

Next, the court acknowledged that the jurisdictional statute of 1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit with certain conditions, pursuant to this Court's decision in *Dalm v. United States,* 494 U.S. 596 (1990).

In considering the relevant tax code statutes, the court concluded that section 6511(a) is silent on the issue of standing:

> "On its face, it is a statute of limitations. It uses the word 'taxpayer' in a natural, grammatically correct way from which I cannot find any inference of a limitation on standing". *Brodey* at pg. 48.

The court also concluded section 7422(a) is silent on the issue:

> "On its face it imposes a requirement for administrative exhaustion prior to lawsuit. The government does not assert its procedures were not followed. The word 'taxpayer' does not appear in the text of this section . . . Section 7701(a)(14) is a definitional statute. The definition of 'taxpayer' appears to be inclusive of anyone at all who is subject to any internal revenue tax at all. The government has advanced no reasoning from which the court could transform this inclusive definition into an exclusive

> one. I cannot find any support for the government's narrow reading of the term 'taxpayer' from the statutory definition in section 7701(a)(14) or elsewhere in the Code". *Brodey* at pg. 48.

Barris v. United States, 851 F.Supp. 696 (W.D.Pa. 1994) cited both *Mona Martin* and *Brodey* with approval:

> "The rule that only those taxpayers who were actually assessed taxes by the IRS can bring suit for a recovery ignores important language in Section 1346(a)(1). It seems clear that in this case, plaintiff has alleged that an Internal Revenue tax has been erroneously or illegally collected from her. Thus, section 1346(a)(1) confers jurisdiction on this court to hear this case.
>
> "Section 6511(a) requires that a claim for refund 'shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid.' This section merely imposes a time limitation on the person filing the claim for a refund or an overpayment of tax. The use of the word 'taxpayer' in this statute of limitations does not constitute a limitation on standing."

In this case, respondent has duly filed with the Secretary of the IRS a timely Administrative Claim for Refund and such claim was rejected by the Secretary (see Statement of the Case, *supra*). As such, the respondent has complied with the prerequisite to this suit mandated by section 7422(a). This distinguishes the respondent from the plaintiff in *Dalm,* who was denied jurisdiction to sue in District Court for the reason that she failed to file the prerequisite Administrative Claim for Refund mandated by section 7422(a). The Administrative Claim for Refund required under section 7422(a) also *does not contain the*

term "taxpayer", and the language tracks the language in 28 U.S.C. 1346(a)(1) in *haec verba*.

The petitioner therefore misinterprets the meaning and purposes of the various statutes cited above to arrive at its conclusion that section 6511(a), through section 7422(a), alters the plain meaning of the language in 28 U.S.C. 1346(a)(1) and reads into that statute the term "taxpayer," a term that alters the plain meaning of the statute.

B.

THE PETITIONER'S ALTERNATIVE REMEDIES WERE NOT REASONABLY AVAILABLE TO RESPONDENT.

In order to blunt the harshness of its position, the petitioner argues that there were several alternative remedies available to respondent, although it acknowledges that none of them are now available since the tax has already been paid. Before explaining why those remedies were not reasonable remedies in situations like this, two preliminary points are worth noting.

First, there is no statutory language in any of the petitioner's alternative provisions that preclude actions for refunds, although section 7426 is made the exclusive remedy for non-taxpayers subject to an IRS levy. Second, none of the statutes cited by the petitioner existed in 1921 when the precedessor of 28 U.S.C. 1346(a)(1) was enacted by Congress. Since the substance of that jurisdictional provision has not changed in the interim, the petitioner in essence maintains that it was always Congress' intent to deny persons in a situation like respondent access to any judicial forum.

Turning to the specifics of the statutes relied on, the petitioner first points to 28 U.S.C. §2410, which permits suits to clear title to real estate. Nothing in that statute

makes the remedy exclusive.[8] More importantly, where the lien was filed eleven days prior to closing escrow and actual notice to respondent was first given seven days prior to the time of closing, it would be unrealistic to expect a lawsuit to be filed to clear title, let alone resolved, in the brief window of time involved before escrow was set to close. It is doubtful Congress intended 28 U.S.C. 2410 to be used in such an emergency situation when a lien is filed while a property is in escrow. Given alternative remedies, it is also unlikely that the respondent would have chosen a quiet title action had she been informed that such a remedy existed.

The second statute mentioned by the petitioner is section 7426, which is the exclusive remedy for non-taxpayers in situations involving wrongful levies. This provision does not apply in this case, because both parties acknowledge that the IRS did not levy on any property. Therefore, this statute was never an alternative for the respondent at any time.

The final provision, on which the petitioner places its greatest reliance, is section 6325(b)(3), which establishes procedures by which an IRS lien on a property may be discharged where there is a dispute about the validity of the IRS lien. Under the procedures outlined in that statute and in the regulations promulgated by the Treasury Department interpreting that statute, the property is sold free and clear, and the disputed proceeds from the sale are put into a fund to which the lien continues to attach, until the dispute is resolved.

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[8]The petitioner acknowledges this fact by asserting that respondent had "alternative remedies" under Title 28 U.S.C. 2410 to "quiet title" or in the alternative soliciting the IRS' approval to set up a fund as permitted in Internal Revenue Code section 6325(b)(3).

We begin by noting that section 6325(b)(3) is written in permissive terms, simply saying that the Secretary "may" discharge the lien under certain conditions. It is plain that the Secretary is not required to do so here or under the remaining paragraphs of subsection (b), in contrast with the mandatory "shall" language in section 6325(a). The treasury regulations interpreting this statute confirm that the decision on whether to substitute the proceeds is entirely up to the IRS, "the district director may, in his discretion, issue a certificate of discharge" 26 CFR 301.6325-1(b)(3). Under those circumstances, it would be extraordinary indeed if Congress intended to make a discretionary act of the Secretary the exclusive remedy in lieu of the right to have a neutral judicial forum decide a dispute over conflicting claims to property.

Second, in this and undoubtedly many other cases, there is a serious problem of timing. The decision on whether the proceeds will be adequate, and whether the Secretary is adequately protected, is often not a simple one. Yet, as in this case, there may be only a week in which to draft such an agreement and have it signed by all parties prior to the time of the closing. Given the way in which these situations tend to arise, it seems highly unlikely that Congress would have insisted that this remedy be exclusive, even if it made it mandatory on the Secretary's part, which it did not.

Finally, the IRS never told respondent about this option, nor is it required to do so. It simply would have made no sense for Congress to assume that persons in the situation of respondent would be familiar with the intricate details of the Internal Revenue Code to know of the possibility of substitution of proceeds and to ask the IRS to do so, all within the extremely truncated time

table available in cases of this kind. Again, the question is not whether such procedures might have been available, but whether the failure to invoke them denies respondent the right to sue for a refund because this provision is exclusive, despite the absence of any indication of exclusivity.

For all of these reasons, there is no basis to conclude that it is reasonable for respondent and others in her situation to have availed themselves of any of these theoretical alternatives, let alone to believe that Congress intended those wholly inadequate alternatives to be the exclusive remedy involving disputes about priority of government liens. Rejection of the petitioner's contention is further supported by the fact that its position would result in the denial of any judicial forum to those, like respondent, who paid the government in full, without knowing that they thereby would be forfeiting all their rights to a judicial forum according to the petitioner's interpretation of the statutes in question.

C.
THE ENACTMENT OF SECTION 7426 WAS NOT INTENDED TO RESTRICT A PLAINTIFF'S ABILITY TO SUE THE GOVERNMENT IN SITUATIONS NOT INVOLVING A LEVY.

The petitioner has attacked the continuing vitality of 28 U.S.C. 1346(a)(1) as the authorizing statute to allow a person to sue the government if subject to an erroneous collection, on the theory that 26 U.S.C. 7426 was enacted in 1966 giving third parties the right to sue the government in the case of a wrongful IRS levy. Petitioner asserts that this statute now provides the exclusive remedy for third parties in all situations, whether or not pertaining to a levy. The petitioner argues cir-

cumstantially that since 26 U.S.C. 7426 specifically grants jurisdiction to "non-taxpayers" when there is a levy, this is therefore the only statute available to "non-taxpayers" for all purposes. There is nothing in the Internal Revenue Code, however, that supports petitioner's argument. Nor is that argument supported in the legislative history of the statute.

The legislative history of section 7426 indicates that the passage of this provision was an attempt by Congress to expand the rights of third parties to recover from the government. In the Senate Finance Committee Report No. 1708 accompanying H.R. 11256, ultimately enacted as P.L. 89-719, the "Federal Tax Lien Act of 1966," the Committee states:

> Present law is quite limited in the extent to which it takes into account the rights of third parties in the procedures set out in the tax laws for the collection of taxes from a taxpayer. Under present law, for example, the United States cannot be sued by third persons where its collection activities interfere with their property rights. This includes cases where the government wrongfully levies on one person's property in attempting to collect from a taxpayer.

There is nothing in the legislative history to section 7426 that indicates that it is designed to be the exclusive remedy for third parties. The language of the Senate Finance Committee specifically discusses "interference with the property rights of third parties" when it discusses no previous remedies available to third parties. This must be distinguished from a suit for refund after an erroneous collection of money from a third party. Section 7426 is entitled "Civil Actions by persons other than taxpayers." A plain reading of the statute does not

indicate that this section is intended to supersede section 7422, which provides the right to sue for a claim for refund under 1346(a)(1) to anyone who has been the subject of erroneous collection activity by the IRS after an Administrative Claim for Refund has been filed with the Secretary. If Congress had intended section 7426 to preempt the field and be the exclusive remedy for third parties to sue the government, it easily could have so stated in section 7426, or in the alternative amended section 7422 to limit its application to only "taxpayers." Congress chose to do neither.

The effect of petitioner's argument is to leave a person such as respondent, who was not subject to an IRS levy, but nevertheless was the subject of erroneous IRS collection activity such as the recording of a lien against her property, without the remedy of suing the IRS for a refund. Petitioner's argument is directly contra to the intent of Congress in passing section 7426, expanding existing rights of third parties to levy situations when the government "interferes with a third party's interest in property rights." There is no indication that Congress when enacting section 7426 considered the rights of third parties who paid off invalid liens to clear title and then sued the IRS for a refund, let alone intended to treat them worse than those third parties subject to a levy.

The absence of any evidence in that statute or otherwise of a congressional intent to do more than make the cause of action under section 7426 the exclusive remedy for one category of injuries to third parties is particularly significant since a number of courts prior to 1966 had allowed suits like the present one to proceed under section 1346(a)(1) or its predecessor. Some of these cases had been resolved in favor of the government, see e.g. *Phillips v. United States,* 346 F.2d 999 (2nd

Cir. 1965), and *First National Bank v. United States,* 265 F.2d 297 (3rd Cir. 1959).

But of greater significance is that there were a number of cases that went against the government, and yet there is no indication that Congress intended to overrule these cases when it enacted section 7426 pertaining to the rights of third parties subject to wrongful levies. See e.g. *Parsons v. Anglim,* 143 F.2d 534 (9th Cir. 1944) (wife pays taxes under protest allegedly owed by deceased husband, she is permitted to sue for a refund); *White v. Hopkins,* 51 F.2d 159 (5th Cir. 1931) (former shareholder of corporation permitted to sue for refund of taxes paid on behalf of third party corporation); *United States v. Halton Tractor Company,* 258 F.2d 612 (9th Cir. 1958) (a voluntary payment that is not intended to be a donation is legally sufficient grounds to confer jurisdiction on the third party to sue the government for a refund) and *McMahon v. United States,* 172 F.Supp. 490 (S.D.N.Y. 1959) (wife was allowed to sue government after levy of deceased husband's insurance proceeds).

In *White,* the court characterized the government's position as "having collected the tax from one who did not owe it, when it could not have been collected from the one who did (because the statute of limitations had run), no right of redress exists." 51 F.2d at 162. The court then continued: "It cannot be assumed that the United States has adopted any such illogical and inequitable attitude towards her citizens unless the enactments of Congress clearly leave no alternative." Further describing the government's interpretation as one that "would lead to injustice and absurd consequences," it concluded that "[o]f course, no such intention can be attributed to Congress . . ." Id. Respondent agrees, in

addition such a construction may raise serious due process problems as well, *Johnson v. Robison,* 415 U.S. 361, 366 (1974) (construing veterans' benefits statute to allow judicial review to avoid constitutional questions of due process).

D.

ALLOWING RESPONDENT TO SUE THE GOVERNMENT WILL NOT OPEN THE "FLOODGATES" OF CLAIMS FOR REFUNDS AS PETITIONER ASSERTS.

The petitioner asserts that a determination by this Court allowing respondent to sue for a refund "threatens to provide a haven for delay or evasion of tax liabilities." In so arguing, the petitioner provides an example where a third party **volunteers** to pay an assessed tax obligation of another, and then proceeds to file a claim for refund after the statute of limitations for collection against the original party who owed the taxes has expired. This case, however, does not present those facts.

In this case, we have an innocent party who, upon receipt of notice from the IRS that it had filed tax liens on her property for the disputed tax liability of her soon to be ex-husband, and while under the duress of foreclosure proceedings and the closing of an escrow to avoid foreclosure, permitted funds to be paid out of that escrow to the IRS. The IRS had recorded the lien on respondent's property only eleven days prior to escrow closing on the property. The IRS never asserted that the respondent owed the taxes in question. Its theory for filing a lien and ultimately collecting the taxes from the proceeds of the sale of her property, Alcima House, was based on its ultimately incorrect theory that respondent's ex-husband had transferred his interest in the property to her without adequate consideration (see previous footnote 2 in this brief).

The position adopted by the petitioner in this case would effectively reward the IRS for its incompetence in interfering with a third person's property rights, prior to conducting a thorough investigation to determine the extent of the true obligor's rights in the property.[9] The IRS would be permitted to operate using a standard far below due diligence in determining whose property can be used to collect taxes owed by another. When the incorrect party who was the victim of the IRS lien files a claim for refund requesting their money back after being forced to pay the taxes to present clear title to a purchaser, the IRS then proceeds to investigate the basis for the lien. After determining that the lien was in fact recorded in error, the IRS then would refuse to allow a refund relying on the doctrine of sovereign immunity.

The petitioner has the audacity in this case to present an argument that allowing an innocent party to receive their money back for taxes she paid under duress and did not owe would effectively provide a haven for evasion, when the IRS had totally within their control and power the ability to determine the rights of the parties to the property prior to placing a lien on the property in the first place. If the government exercised a modicum of caution, due diligence and restraint, it would not be put in the position of having a statute of limitations run against its collection of the taxes due from the proper party.

The petitioner's argument that, if respondent is permitted to sue here, any person can simply volunteer to pay the tax for another and then file a claim for refund

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[9]This IRS collection practice advocated by the government can be paraphrased as the philosophy of "act now, ask questions later."

and be entitled to litigate the other person's tax liability is overstated and specious. The argument fails because it can hardly be contended that respondent is a volunteer in this situation. The IRS filed a notice of tax lien, claiming that it had an interest in her property that had to be paid from the proceeds of the sale of the property. Under those circumstances, when the IRS has taken direct action against the person who is filing the suit for refund, that person is not a volunteer.

The "artifice" that the petitioner alludes to as a scheme to delay or evade the final collection of taxes does not exist when it is the IRS that initiates the collection action by filing a lien.[10] In addition, "volunteers" would have to allege in their complaint for refund (to comply with 28 U.S.C. 1346(a)(1)) that the collection action taken by the IRS was erroneous. However, in the true volunteer situation, the IRS took no collection action at all, but merely accepted a voluntary payment on behalf of the person who owed the taxes. It would be a stretch to say that the mere acceptance of payment

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[10]In their brief on the merits, the petitioner argues that finding standing for respondent in this case could lead to a taxpayer seeking to delay or evade final collection of his tax obligations by the artifice of having the taxes paid by another person, who would then assert a claim that the payment made was erroneous. (Pet. Brf. p. 21 c.). This argument is frivolous. Any person who voluntarily pays the taxes of another is obviously not liable for the taxes paid on behalf of the person owing the taxes, otherwise we would not call such person a "volunteer". The volunteer could not then subsequently sue the government alleging that the collection was erroneous when, without any coercion or duress, it was their decision to volunteer payment of the taxes to the IRS on behalf of someone else who owed the taxes. Nor does the petitioner cite to any examples of the filing of lawsuits in the circuits that have permitted suits against the government by a plaintiff that was such a volunteer.

from a third party volunteer was a "collection action" taken by the IRS. In this case, the IRS definitively took action by filing a lien against the property of the third party. It was this distinction that led this Court to rule in favor of subject matter jurisdiction in *Stahmann v. Vidal,* 305 U.S. 61 (1938). This Court held:

> Whether or not the tax was imposed upon the petitioners, they are, according to accepted principles, entitled to recover unless they were volunteers, which they plainly were not because they paid the tax under duress of goods. Id. at 66.

Even in situations where a true "volunteer" pays the taxes of another, the IRS does not ordinarily accept payment directly from the volunteer but rather from the obligor. For example, a payment to the IRS from a third party on behalf of the person who the IRS has determined owes the taxes is treated by the IRS as having been received directly from the person owing the taxes. In this manner, the IRS avoids problems regarding the "volunteer" ultimately reconsidering their payment and requesting it back from the Service directly. The "volunteer" must obtain reimbursement from the person on whose behalf they made payment. This is the more typical situation where a payment is received from a third party volunteer who pays the tax obligations of another, and the perceived evasion possibilities envisioned by the petitioner are easily avoided by mandating that the payment be made by the actual taxpayer who owes the taxes.

This purely "voluntary" situation cannot occur, however, when it is the IRS that is initiating the collection action by the filing of a lien on the property of a person who does not owe the taxes.

E.

THE PETITIONER OVERSTATES THE WEIGHT OF AUTHORITY SUPPORTING ITS INTERPRETATION OF §1346(a)(1).

The petitioner attempts to paint a picture in their brief that there is an "overwhelming majority" of the Circuit Courts of Appeal that support the petitioner's interpretation of section 1346(a)(1). In reality, the petitioner's claim is overstated. Of all the string citations that the petitioner uses (Pet. Brf. p. 14) to support its position, only the opinion of the Seventh Circuit in *Busse v. United States,* 542 F.2d 421 (7th Cir. 1976) is in line with its argument based on the same facts as in this case. The petitioner also cites to two other Seventh Circuit decisions, *Pershing Division of Donaldson, Lufkin & Jenrette Securities Corp. v. United States,* 22 F.3d 741 (7th Cir. 1994) and *Lac Courte Oreilles Chippewa Indians v. United States,* 845 F.2d 139 (7th Cir. 1988). Both cases merely cite to *Busse* which governs in the Seventh Circuit without any new analysis on the issue. In attempting to show that the Seventh Circuit opinion in *Busse* is the majority position, the petitioner cites a number of inapposite cases attempting to insert them on the side of the *Busse* court. But this is akin to squeezing a square peg into a round hole.

The Fourth Circuit in *Mona Martin,* (citations supra), also on the same facts, is directly contra to *Busse. Mona Martin,* decided fourteen years later in 1990, reads section 1346(a)(1) to allow a lawsuit by a plaintiff who alleges being subject to an erroneous collection action by the Internal Revenue Service. The Ninth Circuit has aligned with *Mona Martin* in this case, and therefore the true "majority" of opinion in an *identical factual situation* is that 28 U.S.C. 1346(a)(1) permits a lawsuit by a

person the subject of an alleged erroneous collection to sue the government for a refund. The Fourth Circuit and the Ninth Circuit have so held, the Seventh Circuit disagrees.

The petitioner cites *United States u Dalm*, 494 U.S. 596 (1990) to supports its theory; however, the *Dalm* case correctly decided that filing an administrative claim for refund is a prerequisite to jurisdiction under 26 U.S.C. 7422(a). The respondent agrees with the *Dalm* decision, which is why she filed the administrative claim for refund pursuant to section 7422(a) prior to bringing suit herein. The plaintiff in *Dalm* had not done so, and therefore there was no waiver of the soversign immunity in that case.

Cases from other circuits relied upon by the petitioner were not decided in the same factual context. One circuit court opinion that the petitioner relies upon to support the *Busse* opinion is the decision of the Fifth Circuit in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987). However, in *Snodgrass*, the Fifth Circuit mistakenly asserted that a payment to clear title was "voluntary," and that section 7426, in essence, preempts jurisdiction in these situations. In addition, the *Snodgrass* decision ***did not attempt to overrule a decision in its own Circuit*** regarding a case with identical facts as ours (a "lien" situation and not a "levy"), *Noonis v. United States*, 576 F.Supp. 853 (U.S.D.C. Wes. Dis. Texas 1983). The *Noonis* decision held, on identical facts as *Mona Martin* and this case, that there was subject matter jurisdiction to sue if an erroneous collection action by the IRS against a third party was alleged under 28 U.S.C. 1346(a)(1).

Like *Snodgrass*, the petitioner's citation to *Phillips v. United States*, 346 F.2d 999 (2d Cir. 1965) misses the point because *Phillips* involved a levy situation and not

a lien. However, in reading *Phillips* it is interesting to note that the court in dicta referred to the fact that a suit could be maintained by a "non-taxpayer" against the District Director, citing to *Bullock v. Latham (Commissioner of Internal Revenue Service)*, 306 F.2d 45 (2nd Cir. 1962). The *Bullock* court cites to numerous decisions involving statutes in force at that time which allowed non-taxpayers to sue the District Director of the Internal Revenue Service directly. The *Bullock* court stated "It is well settled that when property belonging to A is levied upon to satisfy the tax obligation of B, A is not without remedy but may seek redress in the federal courts."

Two other circuit court opinions relied upon by petitioner should also be distinguished. In *Hofheinz v. United States*, 511 F.2d 661 (5th Cir. 1975), the plaintiff was the estate of the deceased attempting to intervene in an action by the executor who had paid the taxes in question and had filed a refund action. The court in *Hofheinz* ruled that intervention was not allowed under 28 U.S.C. 1346(a)(1), particularly since the "taxpayer" executor had already filed suit under that section (which was permitted to proceed). In *Eighth Street Baptist Church, Inc. v. United States*, 431 F.2d 1193 (10th Cir. 1970) the holding of the court is also not quite on point with the facts in this case. The court in that case ruled that an employer, Eighth Street Baptist Church, Inc., could not sue for a refund on behalf of its employees for withholding taken erroneously out of their paychecks. The Court held that it was the employees that had that cause of action as the "taxpayers." There is

an inherent logic to this decision, considering that the employees are the ones who actually paid the tax, despite the fact that the employer sent in the money to the IRS on their behalf. The employer really had no interest in the amount paid, it was not in fact money belonging to the employer. Contrast those facts with the facts in this case, where respondent herself was made to pay the tax obligation of another out of her own money.

It therefore becomes abundantly clear that the "substantial weight" of authority the petitioner alludes to in its brief becomes significantly less substantial when the cases are actually read.

V. CONCLUSION

For all the above reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-395

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Internal Revenue Code provides separate remedies for taxpayers and non-taxpayers. Taxpayers who have paid taxes that have been assessed against them, and who have filed an administrative refund claim in accordance with the requirements of Section 6511(a) of the Code, may bring suit under 28 U.S.C. 1346(a)(1) to challenge an invalid assessment or an unlawful collection of the challenged tax. See 26 U.S.C. 7422(a). Following enactment of a set of statutory provisions known as the Taxpayers' Bill of Rights in 1988 (Pub. L. No. 100-647, Tit. VI, Subtit. J, § 6241(a), 102 Stat. 3747), a "taxpayer" is now also authorized to bring suit against the United States for the "actual, direct economic damages" sustained due to the reckless or intentional disregard of any provisions of the Internal Revenue Code

or its regulations "in connection with any collection of Federal tax" (26 U.S.C. 7433(a), (b)(1)).[1]

Different remedies have been made available to non-taxpayers. See Pet. Br. 17-20; note 1, *supra*. In particular, non-taxpayers whose property has been made subject to a federal lien or levy in satisfaction of another's tax obligation may bring suit against the government under 28 U.S.C. 2410(a) to quiet title to the property or under 26 U.S.C. 7426 to enjoin, or seek the

[1] The damages remedy that 26 U.S.C. 7433 provides for intentional disregard of the Code or regulations in the collection of taxes is available only to "taxpayer[s]." 26 U.S.C. 7433(a). The statute does not apply to a complaint by a non-taxpayer concerning the collection of taxes. See *Le Premier Processors, Inc.* v. *United States*, 775 F. Supp. 897, 903 (E.D. La. 1990) ("the very terms of section 7433(a) limit its remedies to just the taxpayer against whom the IRS has asserted the tax assessment"). In a parallel manner, the remedies available to non-taxpayers for invalid collection actions under 26 U.S.C. 7426 (entitled "Civil actions by persons other than taxpayers") are "not available to persons against whom the tax has been assessed." *United States* v. *Doyal*, 462 F.2d 1357, 1358 (5th Cir. 1972) (per curiam). See 26 U.S.C. 7426(a)(1) (statutory remedy for wrongful levy may be brought by "any person (other than the person against whom is assessed the tax out of which such levy arose)").

The damages remedy created by 26 U.S.C. 7433 applies, by its terms, only to unlawful collection activities; it is inapplicable to claims that the Service has incorrectly calculated or unlawfully imposed the underlying tax itself. As the court stated in *Gonsalves* v. *Internal Revenue Service*, 975 F.2d 13, 16 (1st Cir. 1992) (per curiam):

> Taxpayers who wish to challenge the IRS' calculation of their tax liability must file either a petition for redetermination in the Tax Court, 26 U.S.C. §§ 6213, 6214, or a refund action in the district court. 26 U.S.C. § 7422. Section 7433 was not intended to supplement or supersede, or to allow taxpayers to circumvent, these procedures.

return of funds obtained by, a wrongful levy. As an alternative remedy, non-taxpayers whose property has been made subject to a lien with respect to another's tax obligation may obtain a prompt discharge of that lien by agreeing to hold sufficient proceeds from the sale of the property as substituted collateral for the government's claim, with the same priority as the preexisting lien. 26 U.S.C. 6325(b)(3). Upon completion of such a sale, the respective rights of the non-taxpayer and the government in the substituted cash collateral are to be determined in federal court under 26 U.S.C. 7426(a)(3) and (b)(4). See Pet. Br. 17-18. Unlike the statutory refund suit for "taxpayers" under 28 U.S.C. 1346(a)(1), in each of these various proceedings that Congress has authorized *non*-taxpayers to bring, the underlying "assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid." 26 U.S.C. 7426(c).

Respondent seeks to disregard the important distinctions drawn in the Code between the remedies separately provided for taxpayers and non-taxpayers. Respondent's contention that a non-taxpayer may bring a refund suit under 28 U.S.C. 1346(a)(1) suffers from the obvious logical flaw that the narrowly drawn remedies provided to non-taxpayers under 26 U.S.C. 7426 would thereby be made wholly meaningless. Under respondent's theory, non-taxpayers need not comply with the abbreviated nine-month statute of limitations applicable to non-taxpayer challenges to tax collection under 26 U.S.C. 6532(c), and would be permitted to challenge the validity of the underlying assessment notwithstanding the clear contrary dictates of 26 U.S.C. 7426(c), simply by styling their case as a "taxpayer" refund suit under 28 U.S.C. 1346(a)(1). Respondent's proposed blurring of the separate remedial schemes that Congress provided

for "taxpayers" and "non-taxpayers" misreads the complex of applicable statutes and would yield a remedial scheme susceptible to abuse.

1. As a preliminary matter, respondent has misdescribed various features of the factual record. The courts below addressed only the question whether jurisdiction exists under 28 U.S.C. 1346(a)(1) for respondent's suit to recover the taxes she paid that her former husband owed. As respondent ultimately concedes (Resp. Br. 7), in deciding that jurisdictional question the lower courts did not determine the validity of the tax assessments that the United States made against respondent's former husband or of the liens imposed on the property that he transferred to her. Because only the jurisdictional question is presented at this time, respondent's misdescriptions of the record relating to the validity of the government's liens and of the underlying assessments are presently irrelevant. We therefore respond only briefly to them in the margin.[2]

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[2] Respondent erroneously states that the government "ultimately stipulated" (Resp. Br. 4) that it erred in imposing its liens on respondent's property. The stipulation to which respondent refers is described fully in our opening brief (Pet. Br. 6 n.1). That stipulation establishes that respondent did *not* take her husband's interest in the property as a "purchaser." The property interest that she obtained from her husband therefore remains subject to the liens arising from his tax obligations (*ibid.*).

Respondent further deviates from the record by contending that she was personally unaware of the provisions of 26 U.S.C. 6325(b)(3) which would have permitted her to obtain an immediate release of the government's liens (so that her pending sale could be concluded) simply by agreeing to substitute a sufficient portion of the sale proceeds as collateral for the government's tax claim. Respondent provides no citations to the record for the assertion that she "believed that she had no realistic alternative, and none was suggested to her by the IRS" (Resp. Br. 5). If, at some

2. Respondent offers four interpretive rationales for her contention that 28 U.S.C. 1346(a)(1) authorizes refund suits by non-taxpayers who pay taxes owed by a third party. None of respondent's proposed theories is correct.

a. The principal rationale advanced by respondent, and by the court of appeals in this case, is that the "plain language" of the statute supports the conclusion that anyone—whether a taxpayer or not—may bring suit under 28 U.S.C. 1346(a)(1) to challenge the assessment or collection of taxes. As we have described in detail in our opening brief (Pet. Br. 11-15), however, that contention is based on the erroneous assumption that the language of 28 U.S.C. 1346(a)(1) may properly be read in complete isolation from all other applicable provisions of the Internal Revenue Code. In particular, respondent's contention ignores the expressly applicable provisions of 26 U.S.C. 7422(a).

As this Court has noted, "[b]y its express langauge, [26 U.S.C. 7422(a)] conditions a district court's authority to hear a refund suit, regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected, upon the filing of a claim for refund." *United States* v. *Dalm*, 494 U.S. 596, 609 n.6 (1990). Because only the "taxpayer" may assert a valid claim for refund of federal tax (26 U.S.C. 6511(a)), only a "taxpayer" who has done so may bring a suit for refund under 28 U.S.C. 1346(a)(1). That result follows from the "express

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appropriate stage of the case, those facts were relevant, the government would contest both of them. At present, it is sufficient to note that respondent's alleged ignorance of the applicable sections of the Internal Revenue Code—an asserted ignorance that we would dispute—has no bearing on the jurisdictional question presented to this Court.

language" of 26 U.S.C. 7422(a) which, by its very terms, limits the scope of the jurisidiction otherwise afforded under 28 U.S.C. 1346(a)(1). See *United States* v. *Dalm*, 494 U.S. at 609 n.6.[3]

By failing to consider the plain language of *all* of the applicable statutes, the court of appeals in this case reached an incorrect understanding of this detailed statutory scheme. By contrast, other courts of appeals and Congress have recognized that the Internal Revenue Code provides distinctly separate remedies for taxpayers and non-taxpayers and that only "taxpayers" may bring a refund suit under 28 U.S.C. 1346(a)(1).[4] See Pet. Br. 13-

[3] Respondent suggests that this understanding of the statutory scheme cannot be correct because the government "argues out of the other side of their mouth that the Code provided respondent with various alternative remedies for her predicament" (Resp. Br. 9 n.5). The very fact that the Code *does* provide separately structured and limited remedies for *non*-taxpayers makes sense, however, precisely *because* the Code does not authorize refund suits on behalf of non-taxpayers under 28 U.S.C. 1346(a)(1). If non-taxpayers could bring refund suits, the separate remedies that Congress provided for non-taxpayers under 26 U.S.C. 7426 would have been unnecessary. See pages 11-12, *infra*.

[4] Respondent acknowledges (Resp. Br. 23) that numerous appellate decisions have construed this statutory scheme to permit refund actions under 28 U.S.C. 1346(a)(1) only for "taxpayers." Respondent contends nonetheless that "there were a number of cases that went against the government" (Resp. Br. 24). Two of the appellate cases that respondent cites (*Parsons* v. *Anglim*, 143 F.2d 534 (9th Cir. 1944), and *United States* v. *Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958)) are addressed in our opening brief (Pet. Br. 14-15 n.4). Neither of those decisions discusses or addresses the jurisdictional scope of 28 U.S.C. 1346(a)(1). The other appellate decision cited by respondent (*White* v. *Hopkins*, 51 F.2d 159 (5th Cir. 1931)) merely concluded that, on the facts of that case, the plaintiff was the "taxpayer." In holding that suits by non-taxpayers are not authorized by 28 U.S.C. 1346(a)(1), the

14, 18-19. In particular, in enacting 26 U.S.C. 7426 (a provision entitled "Civil actions by persons other than taxpayers") in 1966, Congress emphasized that the remedies created by that statute were necessary precisely because no other remedies had been made available to non-taxpayers: although a "taxpayer [could] bring a refund action against the Government," "a third person" whose property was subjected to levy for

Seventh Circuit noted in *Busse* v. *United States*, 542 F.2d 421, 425 (1976), that cases such as those on which respondent seeks to rely "must be viewed in light of the failure of the Code prior to [the enactment of 26 U.S.C. 7426 in 1966] to provide a remedy for a third party whose property or interest in property was harmed by a wrongful government levy. The Senate Report on 26 U.S.C. § 7426, which remedied this deficiency, noted that some courts tried to cure the inequitable situation by allowing suits in such cases against IRS' district directors." 524 F.2d at 425. The court concluded in *Busse* that the same decisions that respondent cites to this Court "were perhaps motivated by a similar concern." *Ibid.*

Respondent further contends that, in the cases in which courts of appeals have declined to allow non-taxpayers to bring suit under 28 U.S.C. 1346(a)(1), the facts differ from "this case, where respondent herself was made to pay the tax obligation of another out of her own money" (Resp. Br. 32). Respondent's description of the present case is not accurate: (i) she was not "made to pay" the taxes, for she could simply have held a portion of the sale proceeds of the property under a substituted collateral agreement and litigated the validity of the government's liens in an orderly manner (26 U.S.C. 7426(a)(3)); and (ii) the taxes were not paid "out of her own money" but were instead paid out of the portion of the property's value that she acquired from her husband subject to the government's lien. There is nothing unique about the facts of the present case; respondent was not the "taxpayer" who was "subject to" the tax debt (26 U.S.C. 7701(a)(14)) and is therefore not authorized to bring suit under 28 U.S.C. 1346(a)(1). See, *e.g.*, *Pershing Division of Donaldson, Lufkin & Jenrette Securities Corp.* v. *United States*, 22 F.3d 741 (7th Cir. 1994); *Busse* v. *United States*, 542 F.2d 421 (7th Cir. 1976).

payment of another's taxes was previously "without a remedy against the Government." S. Rep. No. 1708, 89th Cong., 2d Sess. 29 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 27 (1966).[5]

The understanding that Congress expressed in its enactment of Section 7426—that a non-taxpayer may not bring a refund suit under 28 U.S.C. 1346(a)(1)—reflects the natural language of the applicable statutory provisions. As several of the courts of appeals have concluded, that natural reading of the language of the statutes is further reinforced by the established rule that "any waiver of the National Government's sovereign immunity must be unequivocal" and that such waivers are not to be "enlarge[d] * * * beyond what the language requires" (*United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992)). See, *e.g.*, *Snodgrass* v. *United States*, 834 F.2d 537, 540 (5th Cir. 1987); *Phillips* v. *United States*, 346 F.2d 999, 1000 (2d Cir. 1965).

b. Respondent next contends that, even if the provisions of 26 U.S.C. 7422(a) and 26 U.S.C. 6511(a) permit only a "taxpayer" to bring suit under 28 U.S.C. 1346(a)(1), the word "taxpayer" in this context must be understood "in its generic sense" to refer simply to any "person that pays taxes" (Resp. Br. 15). In making that contention, respondent ignores 26 U.S.C. 7701(a)(14), which defines the term "taxpayer"—as used in the provisions of the Code (including, of course, 26 U.S.C. 6511(a))—to mean "any person subject to any internal revenue tax." This statutory definition of "taxpayer" reflects the traditional understanding of that term as referring to "the person ultimately liable for the tax

[5] In recent legislation, Congress has continued its long-standing practice of providing distinctly separate remedies for "taxpayers" and non-taxpayers. See note 1, *supra*.

itself" (*Colorado National Bank* v. *Bedford*, 310 U.S. 41, 52 (1940)).

It is undisputed that respondent's husband, not respondent, is the "taxpayer" who was "subject to" the tax and ultimately liable for it. The taxes involved in this case were assessed solely against respondent's husband; she was not personally liable for his obligation. Pet. App. 2a, 8a.

The tax lien that resulted from her husband's personal liability was imposed on property "belonging to" respondent's husband. 26 U.S.C. 6321. When that property came into respondent's hands, the lien followed along. See Pet. Br. 6-7 & n.1. The fact that respondent thereafter elected to pay her husband's taxes—to remove the lien on the property he had transferred to her—does not make respondent the person who was "subject to," or "ultimately liable for," the tax. Respondent's suggestion that a non-taxpayer becomes a "taxpayer" by paying another's tax obligation does not comport with the language of Section 7701(a)(14). It also would make nonsense of the numerous remedies that the Code provides separately for "taxpayers" and non-taxpayers whose property has become the subject of federal tax collection efforts. See, *e.g.*, 26 U.S.C. 7426; note 1, *supra*.

Respondent further errs in suggesting (Resp. Br. 17) that the fact that she submitted an administrative refund request to the Internal Revenue Service converts her into the "taxpayer" for the purpose of these statutory provisions. Both the applicable statute and its implementing regulations specify that the "[c]laim for credit or refund of an overpayment" that is required under 26 U.S.C. 7422(a) to permit an action to proceed under 28 U.S.C. 1346(a)(1) "shall be filed by the taxpayer" (26 U.S.C. 6511(a); 26 C.F.R. 301.6511(a)-1(a) and (b)). The fact that a non-taxpayer, such as respondent, files an

administrative refund claim does not convert her into the "taxpayer" to satisfy this jurisdictional requirement. *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 590 (Ct. Cl. 1972); *Ray* v. *United States*, 453 F.2d 754, 758 (Ct. Cl. 1972).

c. Respondent contends that, if the refund suit permitted under 28 U.S.C. 1346(a)(1) is available only for suits brought by "taxpayers," part of the language of that statute would be deprived of any meaning. She asserts that the language in 28 U.S.C. 1346(a)(1) "authorizing jurisidiction * * * of an erroneous assessment *or* an erroneous collection would have no meaning because there would always have to be an assessment against a 'taxpayer' (according to petitioner's definition of 'taxpayer') and the words 'or collected' would be rendered irrelevant" (Resp. Br. 12).

This assertion is also incorrect. There are many situations, in addition to the one that respondent herself describes (Resp. Br. 13 n.6), where a taxpayer may challenge a tax that has been wrongfully collected *even though* the assessment itself is valid and is not challenged by the taxpayer. For example, an assessment may not lawfully be collected after the applicable statute of limitations has expired. See 26 U.S.C. 6502(a). A taxpayer who has been subjected to collection past the applicable statute of limiations may bring suit for refund under 28 U.S.C. 1346(a)(1) even though the assessment itself is not challenged. See *Ewing* v. *United States*, 914 F.2d 499, 503-504 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991).[6]

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[6] Refund suits are authorized for an "overpayment" of tax. *United States* v. *Dalm*, 494 U.S. at 609 n.6; *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932). Under 26 U.S.C. 6401(a), the term "overpayment" includes "that part of the amount of the payment of any

Moreover, the premise of respondent's contention rests upon a logical fallacy. It is not correct that "there would always have to be an assessment against a 'taxpayer'" (Resp. Br. 12). An "assessment" is an administrative record of the tax which is filed in the office of the Secretary. 26 U.S.C. 6203. The filing of such an "assessment" in the office of the Secretary is a prerequisite to administrative enforcement procedures such as imposing a lien on the taxpayer's property. See 26 U.S.C. 6322. The filing of an "assessment" is not, however, a prerequisite to a judicial action by the United States for collection of the tax. See 26 U.S.C. 6501(a) (limiting the commencement of any "proceeding in court without assessment for the collection of such tax" to the period within which which an assessment could be timely filed). An administrative assessment is not a necessary prerequisite to the establishment of a tax liability or for collection of a tax.

We agree with respondent that, when possible, statutes should be interpreted in a manner that gives meaning to each of their provisions. The interpretation of 28 U.S.C. 1346(a)(1) that the Internal Revenue Service and Congress have consistently endorsed is consistent with that objective. By contrast, the interpretation that respondent proposes for 28 U.S.C. 1346(a)(1) would deprive the specific remedies that Congress provided for *non*-taxpayers in 26 U.S.C. 7426 of any plausible scope. If non-taxpayers may sue under 28 U.S.C. 1346(a)(1) to obtain the return of monies collected by the government from the sale of liened properties, then the specific (and more limited) remedies that Congress enacted in 26

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internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."

U.S.C. 7426 to address that exact situation were unnecessary and ultimately meaningless.[7]

Respondent misses the point by contending that "nothing in the legislative history to section 7426 * * * indicates that it is designed to be the exclusive remedy for third parties" (Resp. Br. 22). What the legislative history of Section 7426 reflects is that this statute was enacted precisely because no *other* remedy for non-taxpayers existed. The remedies of Section 7426 are "exclusive" only in the sense that Congress has not provided alternative remedies for non-taxpayers and, in particular, has not provided authority for non-taxpayers to pursue tax refund suits under 28 U.S.C. 1346(a)(1). See S. Rep. No. 1708, *supra*, at 29; H.R. Rep. No. 1884, *supra*, at 27.

d. Respondent further contends that she should be regarded as the "taxpayer" for purposes of a refund suit under 28 U.S.C. 1346(a)(1) because she tendered payment "under duress of an imposition of a lien during foreclosure of property about to be sold" (Resp. Br. 7-8). But Congress did not require respondent to pay these taxes; they were due only from her husband (Pet. 2a, 8a-9a). Congress also did not require respondent to pay the taxes in order to obtain a release of the federal tax lien on her husband's property. Indeed, if respondent had followed the statutory mechanism that Congress provided, there would have been no need for a "refund" suit at all. Under 26 U.S.C. 6325(b)(3), a person whose property becomes subject to a tax lien arising from the

[7] This is confirmed by the fact that 26 U.S.C. 7426(a)(1) expressly makes the remedy provided by that statute available only to "any person (other than the person against whom is assessed the tax out of which the levy arose)"—and thus unavailable to a "taxpayer."

activities of a third person may obtain an immediate certificate of discharge of the lien by agreeing with the Secretary to hold the proceeds of a sale of the property "as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property" (*ibid.*). The respective rights of the non-taxpayer and the United States in that fund (and, in particular, the validity of the federal tax lien in the property) may then be determined in a suit brought in federal district court. 26 U.S.C. 7426(a)(3). If the non-taxpayer prevails in that suit, "the court may grant judgment [in that party's favor] in an amount equal to all or any part of the amount of such fund." 26 U.S.C. 7426(b)(4).

Respondent cannot plausibly suggest that she paid taxes owed by her husband under duress when, under the applicable statutes, she was not required to pay the taxes at all, even in order to conclude her pending sale of the property. She was only required thereafter to submit to an orderly adjudication of her rights, which is not "duress."[8]

3. Respondent errs in contending (Resp. Br. 26-28) that tax refund suits by non-taxpayers would not result

[8] Respondent errs in contending that the remedy provided by 26 U.S.C. 6325(b)(3) is impractical because the Secretary has "discretion" in determining in each instance whether to enter into a substitution of collateral agreement (Resp. Br. 8). It was obviously appropriate for Congress to give the Secretary discretion to determine, in individual factual contexts, what requirements should be attached to a substitution of collateral agreement in order to provide full protection for the government's tax claim. There is no suggestion in this case, or in any other case of which we are aware, that the Secretary's discretion under this statute has been abused.

in confusion or abuse. Respondent attempts to distinguish the situation (i) where a non-taxpayer pays taxes owed by a third person after a lien is filed on property from (ii) that of a person who "simply volunteer[s] to pay the tax for another and then file[s] a claim for refund" (Resp. Br. 26). Respondent suggests that abuse can occur only in the latter context, which she describes as the "true volunteer" situation.

Nothing in the text of any of the applicable statutes supports the hypothetical distinction that respondent attempts to draw between "the true volunteer situation" (Resp. Br. 27) and the non-volunteer situation. In any event, as we have explained, respondent was a "true volunteer" (in the sense that she uses that term) because she failed to pursue the available statutory alternative of obtaining an immediate release of the lien by agreeing to substitute as collateral for the lien an appropriate share of the proceeds of her proposed sale of the property. See pages 12-13, *supra*; 26 U.S.C. 6325(b)(3).

A tax lien is not imposed on property belonging to a third party. Instead, it is imposed only on property "belonging to" the taxpayer. 26 U.S.C. 6321. For the reasons described in detail in our opening brief (Pet. Br. 20-21 & nn.3, 10), it is when a taxpayer *transfers* property encumbered by such a lien to a third party (as in the present case) that the possibility of delay and evasion of the final payment of tax would occur if non-taxpayers were permitted then to remit payment and bring "refund" suits under 28 U.S.C. 1346(a)(1).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1995